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No.

IN THE

Supreme Court of the United States

UNITY REAL ESTATE COMPANY, *et al.*,
Petitioners,

vs.

MARTY D. HUDSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the severe retroactive liability imposed by the Coal Industry Retiree Health Benefit Act of 1992 on companies that last signed a National Bituminous Coal Wage Agreement in 1981 (eleven years before the Coal Act was enacted) or 1984 (eight years before the Coal Act was enacted) violates the Takings Clause or the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners Unity Real Estate Company and Barnes & Tucker Company were plaintiffs and appellants in the proceedings below. Respondents Marty D. Hudson, Michael H. Holland, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky, and William P. Hopgood, as trustees of the United Mine Workers of America Combined Benefit Fund, were defendants and appellees below. Respondents Hudson, Holland, Thomas F. Connors, and Robert G. Wallace, as trustees of the United Mine Workers of America 1992 Benefit Plan, also were defendants and appellees below. Respondent United States of America was an intervenor-defendant and appellee below. The LTV Corporation and NACCO Industries, Inc. appeared in the court of appeals as *amici curiae* supporting the appellants.

Neither Unity nor Barnes & Tucker has a parent corporation or a publicly held company that owns 10 percent or more of its stock. Unity is a family-owned company. Since 1986, five individuals have owned all the stock of Barnes & Tucker.

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PETITION FOR A WRIT OF CERTIORARI

Unity Real Estate Company and Barnes & Tucker Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not yet reported. The opinion of the district court in the *Unity* case (Pet. App. 61a) is reported at 977 F. Supp. 717. The opinion of the district court in the *Barnes & Tucker* case (Pet. App. 79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS

The Fifth Amendment of the Constitution and pertinent provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722, are reproduced at Pet. App. 175a.

STATEMENT OF THE CASE

The Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-9722, requires former signatories of expired National Bituminous Coal Wage Agreements ("NBCWAs") to provide lifetime health benefits to former employees and their spouses and dependents. In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), the Court held that the Coal Act was unconstitutional as applied to a company that last signed an NBCWA before 1974. This case presents the question whether the Coal Act is also unconstitutional as applied to companies that last signed an NBCWA either in 1981 (eleven years before the Coal Act was enacted) or in 1984 (eight years before the Coal Act was

enacted). It involves an even more draconian application of the Coal Act than did *Eastern*, for the liability at issue here, if upheld, would retroactively take away all assets of both petitioners.

This case presents several important questions left unsettled by the divided opinions in *Eastern*, including (1) the appropriate legal framework for assessing the constitutionality of retroactive economic statutes, (2) the appropriate rules for construing plurality opinions of this Court, and (3) the scope of the holding in *Eastern* itself. The Coal Act imposes on petitioners devastating retroactive liabilities, based on activities years before its enactment, that are unrelated to past promises made or injuries caused by petitioners. In *Eastern*, five Justices concluded that such retroactive liabilities are unconstitutional. *See id.* at 2149-53 (plurality opinion of O'Connor, J.) (applying Takings Clause); *id.* at 2158-60 (Kennedy, J., concurring in the judgment and dissenting in part) (applying Due Process Clause). In this case, however, the court of appeals reached a different result. It held that, because the plurality and the concurrence rested on different clauses of the Fifth Amendment, *Eastern* establishes no general constitutional or retroactivity principles, but instead must be restricted to its facts. Then, applying its own due process analysis, which closely tracked the *Eastern* dissent, the court upheld the Coal Act as applied.

1. National Bituminous Coal Wage Agreements

For over five decades, the terms of employment in bituminous coal mines have been governed by the NBCWAs, a series of collective bargaining agreements between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association ("BCOA"). At least eleven different NBCWAs were executed between 1947 and 1971. *See id.* at 2138 (plurality); *id.* at 2165-66 (Breyer, J., dissenting). Four different NBCWAs were executed between 1974 and 1984. Pet. App. 96a-174a.

The pre-1974 NBCWAs provided pension and health benefits to UMWA retirees and their dependents through a single multi-employer fund. During this period, "miners and their dependents were not promised specific benefits." 118 S. Ct. at 2138 (plurality). Instead, signatory employers promised to make defined contributions to the relevant fund during the term of each NBCWA, and the trustees of that fund were authorized to "adjust the level of benefits . . . to remain within the budgetary constraints." *See id.*

The 1974 NBCWA created two new employee welfare plans to provide health benefits to UMWA retirees (and their spouses and dependents): the United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Plan"), which provided health benefits to miners who retired before 1976, and the United Mine Workers of America 1974 Benefit Plan and Trust ("1974 Plan"), which provided health benefits to miners who retired after 1975. *See id.* at 2139.[1] As incorporated into the 1974 NBCWA, Article III of the 1950 Plan stated explicitly that no benefits were guaranteed: "In the event the assets of the 1950 Benefit Trust become insufficient to pay the benefits provided under the Plan, the benefits may be suspended or reduced to amounts which, in the judgment of the trustees, can be paid from the assets of the 1950 Benefit Trust." Pet. App. 110a. The 1974 Plan contained an identical restriction on benefits. Pet. App. 111a-13a. Article XX(d) of the 1974 NBCWA required signatory employers to make defined contributions to the 1950 Plan and the 1974 Plan. These obligations were specified by reference to current production, either in terms of cents-per-ton (for each ton of coal mined) or cents-per-hour (for each hour of UMWA labor). Pet. App. 99a-101a. All of

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[1] To comply with the Employee Retirement Income Security Act of 1974 ("ERISA"), the 1974 NBCWA also created two separate funds to provide pension benefits to UMWA retirees (and their spouses and dependents). *See* 118 S. Ct. at 2139 (plurality).

these obligations applied only "[d]uring the life of this agreement . . . and ending when this agreement is terminated." *Id.*

The 1978 NBCWA provided health benefits to three different categories of UMWA retirees (and their spouses and dependents). *First*, miners who retired before 1976 continued to receive health benefits through the 1950 Plan. *See* 118 S. Ct. at 2139-40 (plurality). As incorporated into the 1978 NBCWA, Article III of the 1950 Plan expressly stated that, if plan assets "become insufficient to pay the benefits provided under the Plan on or after March 27, 1981," the expiration date of the 1978 NBCWA, "the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the net assets" of the 1950 Plan. Pet. App. 131a. *Second*, miners who retired after 1975, if their former employer remained in the coal mining business, received benefits through newly-created individual-employer plans ("IEPs"). *See* 118 S. Ct. at 2140 (plurality). Article XX(c)(3)(i) of the 1978 NBCWA stated that "[t]he benefits provided pursuant to such [IEPs] shall be guaranteed during the term of this Agreement." Pet. App. 117a. *Third*, miners who retired after 1975, if their former employer was no longer in the coal mining business, continued to receive benefits through the 1974 Plan. *See* 118 S. Ct. at 2140 (plurality). Article XX(c)(3)(iii) of the 1978 NBCWA provided that the "sole purpose" of the 1974 Plan was to provide health benefits "during the term of this Agreement." Pet. App. 117a. Similarly, Article III of the 1974 Plan stated that, if plan assets "become insufficient to pay the benefits provided hereunder, on or after March 27, 1981, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the net assets" of the 1974 Plan. Pet. App. 132a.

The 1978 NBCWA contained several provisions to ensure adequate funding for these benefits. Like its predecessor provision, Article XX(d) of the 1978 NBCWA required signatory employers to make defined cents-per-ton or cents-

per-hour contributions to the UMWA plans "during the life of this Agreement . . . and ending when this Agreement is terminated." Pet. App. 118a-21a. Moreover, the 1978 NBCWA contained a new Article XX(h), the so-called "Guarantee Clause," under which signatory employers agreed to "fully guarantee" all of the promised benefits. Pet. App. 121a. The Guarantee Clause further provided for contribution rates to be increased "[i]n order to fully fund these guaranteed benefits." *Id.* By its express terms, the Guarantee Clause also applied only "during the term of this Agreement." *Id.*[2]

Successor NBCWAs were executed in 1981 and 1984. These agreements left essentially unchanged the structure through which UMWA retirees (and their spouses and dependents) received health benefits. The 1981 NBCWA carried forward the various term-of-the-agreement limitations contained in Article XX(c) (Pet. App. 135a-37a), in Article XX(d) (Pet. App. 137a-39a), in Article XX(h) (Pet. App. 140a), and in Article III of the incorporated 1950 Plan and 1974 Plan (Pet. App. 152a-53a). The 1984 NBCWA also carried forward all of these same term-of-the-agreement limitations. Pet. App. 156a-61a, 173a-74a.

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[2] The 1978 NBCWA also incorporated a new so-called "Evergreen Clause," which required former NBCWA signatories to contribute to the UMWA benefit plans "at the rates specified in the current NBCWA, irrespective of the employer's failure [to] sign that NBCWA." *UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469, 473 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993). The Evergreen Clause "addressed only employer funding, not the scope of the underlying employee benefits." Pet. App. 59a (concurrence). As the majority below recognized, because the NBCWAs have always specified contribution obligations in terms of current production, the Evergreen Clause "has no bearing" on former signatories who have ceased mining bituminous coal entirely. Pet. App. 36a.

2. The Coal Act

Following a long strike against the Pittston Coal Company in 1989,[3] Secretary of Labor Elizabeth Dole created the Advisory Commission on United Mine Workers of America Retiree Health Benefits ("Coal Commission"). In its final report to Secretary Dole, the Coal Commission asserted that "'coal miners have been promised and guaranteed health care benefits for life.'" *See* 118 S. Ct. at 2141 (plurality) (quoting report). That report did not discuss any contractual terms of the pre- or post-1974 NBCWAs, and did not state where, when, or by whom this alleged promise of lifetime health benefits had been made.[4] However, in testimony before Congress, the Chairman of the Coal Commission stated that this alleged promise "'began in the collective bargaining process nearly 50 years ago.'" *See* 118 S. Ct. at 2141 (plurality) (quoting testimony by W.J. Usery, Jr.).

The Coal Act merged the 1950 Plan and the 1974 Plan into a successor United Mine Workers of America Combined Benefit Fund ("Combined Fund"). 26 U.S.C. § 9702(a)(2). Eligible beneficiaries of that fund include all retirees who were

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[3] That strike arose because Pittston mined coal, but refused to contribute to the UMWA funds, during the term of the 1988 NBCWA. Ultimately, the D.C. Circuit held that the Evergreen Clauses contained in pre-1988 NBCWAs, which Pittson had signed, required the company to contribute to the UMWA funds so long as it mined coal during the term of the 1988 NBCWA. *See* 984 F.2d at 471-75.

[4] The Coal Commission appears never to have examined the actual NBCWAs at all, for its final report acknowledged that the Commission relied only on secondary materials "prepared and presented" by the UMWA and the BCOA. *See* Coal Comm'n Report at 15 n.1, *reprinted in* CA3 Supp. App. at 375 n.1. Those entities had every incentive to contend that former signatories of expired NBCWAs had continuing obligations even after they had ceased mining bituminous coal entirely. In contrast to the UMWA and the BCOA, such former signatories were not represented on the Coal Commission.

eligible to receive benefits and were receiving benefits from a predecessor UMWA plan on July 20, 1992. *Id.* § 9703(f). These beneficiaries are entitled to receive, for the rest of their lives, "substantially the same" health benefits that they previously had received under the predecessor UMWA plans. *Id.* § 9703(b)(1). The Coal Act funds these benefits through retroactive liabilities imposed on former signatories of expired NBCWAs. *Id.* § 9704(a)(1) & (b)(1).[5]

The Coal Act also created a new United Mine Workers of America 1992 Benefit Plan ("1992 Fund"). Eligible beneficiaries of the 1992 Fund are miners who would otherwise receive no Coal Act benefits, who retired on or before September 30, 1994, and who would have been eligible to receive benefits (but for enactment of the Coal Act) under the predecessor UMWA plans as of February 1, 1993. *Id.* § 9712(b)(2). These beneficiaries also are entitled to receive, for the rest of their lives, "substantially the same" benefits that they would have received under the predecessor UMWA plans. *Id.* § 9712(c)(1). These benefits also are financed by retroactive liabilities imposed on former signatories of expired NBCWAs. *Id.* § 9712(d)(1)(B), (d)(3).

3. *Eastern Enterprises*

Eastern involved a company that had signed eight NBCWAs between 1947 and 1964 and left the coal mining industry in 1965. *See* 118 S. Ct. at 2142-43 (plurality). There was no majority opinion: four Justices concluded that the Coal Act as applied in that case violated the Takings Clause, one Justice concluded that the Coal Act as applied violated the Due

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[5] Each former signatory must pay a "health benefit premium" to cover benefits for all beneficiaries "assigned" to it. 26 U.S.C. § 9704(a)(1) & (b)(1). Beneficiaries are "assigned" to a former employer according to criteria set forth in § 9706. The Coal Act also imposes on each former signatory an additional "death benefit premium" (*id.* § 9704(c)) and "unassigned beneficiaries premium" (*id.* § 9704(d)).

Process Clause, and four Justices concluded that the Coal Act as applied violated neither clause. Nonetheless, five Justices agreed that the Coal Act was unconstitutional as applied because of its severe, disproportionate, and unjustified retroactivity. *See id.* at 2151 ("Retroactivity is generally disfavored in the law, in accordance with 'fundamental notions of justice' that have been recognized throughout history.") (citations omitted); *id.* at 2158-59 (concurrence) ("for centuries our law has harbored a singular distrust of retroactive statutes").

The *Eastern* plurality proposed a four-part test for assessing the constitutionality of retroactive employee benefits funding legislation. They concluded that if a statute

> singles out certain employers to bear a burden that is [1] substantial in amount, [2] based on the employers' conduct far in the past, and [3] unrelated to any commitment that the employers made [4] or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.

118 S. Ct. at 2153. Applying that test, the plurality concluded that the Coal Act was unconstitutional as applied because (1) it imposed on Eastern a "considerable" liability of at least $50 million, *id.* at 2149; (2) that liability arose out of conduct concluded in 1965, long before the Coal Act was enacted in 1992, *id.* at 2150; (3) neither Eastern nor any other pre-1974 NBCWA signatory had made "any agreement — implicit or otherwise" to provide lifetime retiree health benefits, *id.* at 2152; and (4) Eastern did not cause its employees' need for general health benefits, *id.* at 2152-53. The plurality explained that the absence of any prior employer commitment distinguished *Connolly v. PBGC*, 475 U.S. 211 (1986), and *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), which had upheld the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") as sufficiently

"calibrated" to past promises. *See* 118 S. Ct. at 2152.[6] Similarly, the plurality explained that the absence of any causal connection between past employment and the retirees' current need for general health benefits distinguished *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), which had upheld the imposition of retroactive liability for black lung disease caused by past employment in coal mines. *See* 118 S. Ct. at 2152-53.

Justice Kennedy concluded that the same considerations establish a violation of due process. Like the plurality, he stressed that the Coal Act "imposes a staggering financial burden," *id.* at 2154; "has a retroactive effect of unprecedented scope," *id.* at 2159; and "bears no legitimate relation" to any asserted governmental interest, *id.* On the latter point, Justice Kennedy specifically agreed with the plurality that the absence of any past commitments made, or injuries caused, by pre-1974 NBCWA signatories distinguished this Court's prior decisions upholding the imposition of retroactive liability on employers. *See id.* Justice Kennedy stressed that he and the plurality relied on the same "retroactivity precedents" (*id.* at 2158) and that his analysis was "in full accord with many of the plurality's conclusions" (*id.* at 2154).

4. This Litigation

This case involves application of the Coal Act to petitioners Unity Real Estate Company and Barnes & Tucker Company. Through a subsidiary, Unity last signed an NBCWA and ceased all of its coal mining operations in 1981 (eleven years before the Coal Act was enacted). Pet. App. 8a. Barnes & Tucker

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[6] MPPAA requires employers withdrawing from a multi-employer pension plan to pay their proportionate share of the plan's "unfunded *vested* benefits." *See, e.g., Connolly*, 475 U.S. at 217 (emphasis added and citations omitted). Thus, MPPAA merely sought to ensure that employees would be "fully compensated" with pension benefits that their employers previously had promised. *See PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 725, 733-34 (1984).

last signed an NBCWA in 1984 (eight years before the Coal Act was enacted) and ceased the last of its coal mining operations in 1986 (six years before the Coal Act was enacted). Pet. App. 9a. Application of the Coal Act would bankrupt Unity immediately and would bankrupt Barnes & Tucker within two years. Pet. App. 9a-10a.

Unity is a family business that owns a small commercial building and a parking lot. It employs two individuals, a corporate officer who earns $7000 per year and a janitor. Its net worth is approximately $85,000. Pet. App. 9a. Unity's predecessor companies signed NBCWAs between 1947 and 1961, and a subsidiary signed the 1974, 1978, and 1981 NBCWAs. Unity ceased all of its coal mining operations in 1981. Pet. App. 8a. In 1992, however, Unity was assigned 76 Coal Act beneficiaries. By 1996, its accrued and unpaid Coal Act liabilities exceeded $450,000. Those liabilities are "over six times its total assets." Pet. App. 9a.[7]

Barnes & Tucker signed NBCWAs in 1971, 1974, 1978, and 1981. In 1984, it signed a "me-too" agreement incorporating the 1984 NBCWA. It closed its last coal mining operation in 1986. Since then, its activities have been confined to paying workers' compensation and black lung claims, treating acid mine drainage from its closed mines, and leasing property to third parties. In 1992, Barnes & Tucker was assigned 1564 Coal Act beneficiaries. Pet. App. 9a. Its Coal Act liability is approximately $2.5 million per year. Pet. App. 41a.[8] By contrast, its average gross revenue, between 1992 and 1996, was barely over $1 million per year. CA3 App. at 338. Thus,

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[7] As the court of appeals acknowledged: "Unity's assets are tiny, and its Coal Act liabilities dwarf them. If we uphold the defendants' position, this small family business will be bankrupted instantly." Pet. App. 53a.

[8] Barnes & Tucker estimated that its total Coal Act liability is approximately $50 million. *See* CA3 App. at 337-38.

if Barnes & Tucker "is forced to continue paying its Coal Act liabilities, all of its assets will be consumed in less than two years." Pet. App. 10a.[9]

Petitioners filed separate actions to challenge the constitutionality of the Coal Act as applied. In the *Unity* case, the district court granted a preliminary injunction on takings grounds, noting that Unity's past employment relationships "did not create any legitimate expectation of lifetime benefits." *Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818, 832 (W.D. Pa. 1995). Despite that decision, however, the district court later granted summary judgment against both petitioners. Pet. App. 61a, 79a. A divided panel affirmed, but only with "substantial hesitation" about what it characterized as an "exceedingly close question." Pet. App. 3a.[10]

In Part II of its opinion, the majority below addressed the extent to which *Eastern* controls other cases. The majority held that the lower courts are *not* bound by the points of agreement between the retroactivity analyses of the *Eastern* plurality and concurrence, because those opinions rested on the Takings Clause and the Due Process Clause respectively, and because "neither constitutional ground is a more limited version of the other." Pet. App. 16a. Instead, the majority concluded, *Eastern* controls only "substantially identical" cases involving the constitutionality of the Coal Act as applied to companies that last signed an NBCWA prior to 1974. Pet. App. 16a-17a. At the same time, however, the majority held that the lower courts *are* bound by the points of agreement between the

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[9] In April 1996, Barnes & Tucker estimated that its Coal Act liabilities would lead to its complete liquidation and bankruptcy within approximately four years (*i.e.*, by April 2000). CA3 App. at 338.

[10] Consistent with that characterization, the Third Circuit took the extraordinary course of holding two oral arguments and ordering three rounds of briefing.

takings analyses of the *Eastern* concurrence and dissent, both of which had stated that impact on a "specific" property interest is an essential element of any Takings Clause claim. Pet. App. 17a ("we are bound to follow the five-four vote against the takings claim in *Eastern*").

In Part III of its opinion, the court of appeals rejected petitioners' claims under its own due process analysis. The lynchpin of the court's analysis was its conclusion that the post-1974 NBCWAs created a "reasonable expectation" (or could reasonably be construed to create a "reasonable expectation") that retirees would receive lifetime health benefits from the UMWA funds. Pet. App. 26a-36a. The court acknowledged that, under the plain language of the post-1974 NBCWAs and the incorporated fund documents, the trustees of the UMWA funds "were obligated to provide benefits only 'during the term of this agreement,' just as the companies were only required to contribute during the term of the contract." Pet. App. 34a. Nonetheless, the court relied heavily on what it characterized as "contradictory language" (*id.*) in a "General Description" of benefits attached to the post-1974 NBCWAs, which refers to beneficiaries' retaining a health services card "for life" or "until death." Pet. App. 29a-30a.[11] The court also relied heavily on "[t]he fact that NBCWAs continue[d]" through a series of successor agreements. Pet. App. 31a; *see also* Pet. App. 33a n.9 (noting "the fact that the NBCWAs persisted for decades"). The court asserted two further rationales for imposing perpetual obligations on former signatories of expired NBCWAs: their purported "responsibility" for the UMWA funds' financial difficulties (Pet. App. 21a-25a) and the fact that "[t]he coal industry has been heavily regulated for decades"

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[11] In discussing "Other Contractual Provisions" (Pet. App. 36a-37a), the court mentioned only the Evergreen Clause, which it acknowledged is inapplicable to former NBCWA signatories who have left the coal mining industry (Pet. App. 36a), and the Guarantee Clause, which by its terms applied only "during the term" of each NBCWA (*e.g.*, Pet. App. 121a).

(Pet. App. 25a).[12] After concluding that the post-1974 NBCWAs created a "reasonable expectation" of lifetime health benefits, the court had little trouble holding that the Coal Act was constitutional despite its "quite long" periods of retroactivity (Pet. App. 39a) and its "substantial" economic burdens (Pet. App. 42a).

Judge Aldisert concurred only in the majority's judgment. He stated emphatically that "the Wage Agreements expressly limited all of the promised retiree health benefits to the term of each agreement":

> I simply can find no evidence of any "promise" of lifetime benefits contained in any Wage Agreement. Any reliance on extra-contractual "promises" looks to a novel theory of law that turns a blind eye to the centuries-old law of contracts and to the current law on collective bargaining agreements.
>
> * * * *
>
> To the miner, the actual contract controlled, not the expectation of future agreements. Without the contract in hand, the miners would not pick up their lamps at the lamp house and descend into the shafts. They worked under the precise language in a given contract and under no other representations.

Pet. App. 58a-59a. Judge Aldisert concluded that the Coal Act could be sustained "for one reason only": because the Coal Commisson had construed the post-1974 NBCWAs differently,

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[12] The court rejected a separate argument, which it incorrectly attributed to petitioners, that the Coal Act is unconstitutional solely because it imposes retroactive liability for benefits unrelated to past mining injuries. Pet. App. 20a-21a. What petitioners argued, however, is that this feature of the Coal Act merely forecloses the particular justification for retroactive liability approved by this Court in *Turner Elkhorn*.

and because its report was among the materials considered by Congress. Pet. App. 55a-56a.[13]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH *EASTERN ENTERPRISES* ON THE SPECIFIC QUESTION WHETHER THE COAL ACT IS UNCONSTITUTIONAL

Five Justices in *Eastern*, reasoning from the common premise that retroactivity is highly disfavored in our legal culture, concluded that retroactive employee benefits funding legislation is unconstitutional if it imposes on employers a "substantial" economic burden, based on conduct "far in the past," that is "unrelated to any commitment that the employers made or to any injury they caused." *See* 118 S. Ct. at 2153 (plurality); *id.* at 2158-60 (concurrence). The court of appeals failed to apply that rule, however, for it concluded that the retroactivity analyses of the *Eastern* plurality and concurrence control only "substantially identical" cases involving companies that signed only pre-1974 NBCWAs. Pet. App. 15a-17a. Had the court applied the retroactivity principles endorsed by five Justices in *Eastern*, it would have had to invalidate the Coal Act as applied to companies that signed post-1974 NBCWAs. As another court of appeals has explicitly recognized, for purposes of assessing the constitutionality of the Coal Act as applied, "[n]othing radical happened in 1974." *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1128 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996).

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[13] In *Anker Energy Corp. v. Consolidated Coal Co.*, No. 98-3451, 1999 WL 301735 (3d Cir. May 14, 1999), the court of appeals confirmed its view that *Eastern* contains no binding legal holdings (*id.* at *8-*11) and that the Coal Act is constitutional as applied to companies that signed post-1974 NBCWAs (*id.* at *11-*13).

A. Under the retroactivity principles endorsed by five Justices in *Eastern*, the Coal Act is plainly unconstitutional as applied to companies that, as former signatories of expired post-1974 NBCWAs, are burdened by severe, disproportionate, and retroactive Coal Act liabilities. Each of the four elements of the retroactivity analysis adopted by the *Eastern* plurality, and endorsed by the *Eastern* concurrence, is present in this case.

First, as the court of appeals acknowledged, the Coal Act liabilities imposed on Unity (over $450,000 by 1996) and Barnes & Tucker (estimated to total approximately $50 million) are "certainly substantial" under any rational measure. Pet. App. 42a. They are obviously substantial in absolute amount.[14] More importantly, they are substantial relative to the limited three- or four-year commitments undertaken by Unity on three occasions between 1974 and 1981, and by Barnes & Tucker on four occasions between 1974 and 1984. Finally, they are substantial relative to the total size of both petitioners, for the court of appeals acknowledged that application of the Coal Act would "put these particular [petitioners] out of business." Pet. App. 42a. That fact underscores not only the severe burden imposed on petitioners in this case, but also the crucial importance of the question presented to small businesses throughout the coal mining industry. As Judge Aldisert ominously noted, "the operation of the present statutory solution to the vexing health benefit problem of retirees . . . may serve as a full employment program for bankruptcy lawyers." Pet. App. 60a.

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[14] The court of appeals observed that a small absolute liability might be constitutional even if it were disproportionate. Pet. App. 41a-42a (hypothetical involving "a one-dollar burden"). However, this case is obviously not governed by the maxim that "the law cares not for trifles," *see, e.g., Wisconsin Dep't of Rev. v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

Second, as the court of appeals acknowledged, the degree of retroactivity at issue here, although less extreme than that present in *Eastern*, "is still quite long." Pet. App. 39a. The Coal Act imposed liability in this case eleven years after Unity last signed an NBCWA and ceased mining coal, eight years after Barnes & Tucker last signed an NBCWA, and six years after Barnes & Tucker terminated the last of its coal mining operations. Pet. App. 8a-9a. This multi-year reachback cannot be defended as "confined to short and limited periods required by the practicalities of producing national legislation," *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981) (per curiam). That justification for retroactivity typically applies to statutes with a reachback period of not more than one year. *See, e.g., United States v. Carlton*, 512 U.S. 26, 32-33 (1994) (one-year retroactivity period designed to cure drafting error); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 730-31 (1984) (five-month retroactivity period designed to prevent strategic behavior "while Congress debated necessary revisions in the statute").[15]

Third, the retroactive Coal Act liabilities imposed on petitioners are vastly broader than any of their past promises or commitments. On their face, the post-1974 NBCWAs made absolutely clear that *both* the retiree entitlements (to receive defined health benefits) *and* the corresponding employer duties (to pay for those benefits) were limited to the term of each contract: Article XX(c) of each NBCWA limited retiree

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[15] The court of appeals held that the relevant retroactivity period for Barnes & Tucker was only four years (measured from the expiration date of the 1984 NBCWA). Pet. App. 38a-39a. That analysis is incorrect because Coal Act liability is triggered by the *signing* of an NBCWA or "me too" agreement, *see* 26 U.S.C. §§ 9701(c)(1), 9706 — an event that, for Barnes & Tucker, last occurred in 1984. The court of appeals' error in this regard is immaterial, however, because even a four-year retroactivity period cannot possibly be justified by "the practicalities of producing national legislation" (*Darusmont*, 449 U.S. at 296-97).

entitlements to "the term of this Agreement" (*e.g.*, Pet. App. 116a-117a); Article XX(d) of each NBCWA limited employer contribution requirements to "the life of this Agreement" (*e.g.*, Pet. App. 118a-121a); Article XX(h) of each NBCWA limited the guarantee of full funding to "the term of this Agreement" (*e.g.*, Pet. App. 121a); and Article III of the incorporated plan documents stated that all defined benefits could be "suspended or reduced" after expiration of the underlying NBCWA (*e.g.*, Pet. App. 152a-153a). The judges below repeatedly acknowledged these clear contractual limitations. *E.g.*, Pet. App. 34a (majority) ("the Trustees were obligated to provide benefits only 'during the term of this agreement,' just as the companies were only required to contribute during the term of the contract"); Pet. App. 58a (concurrence) ("the Wage Agreements expressly limited all of the promised retiree health benefits to the term of each agreement").[16]

Fourth, the broad package of health benefits afforded under the Coal Act is in no sense a remedy for injuries caused by past employment in coal mines. Five Justices reached that conclusion in *Eastern*, *see* 118 S. Ct. at 2152-53 (plurality); *id.* at 2159 (concurrence), and their analysis in this regard applies to signatories of post-1974 NBCWAs no less than to signatories of pre-1974 NBCWAs.

B. Every justification asserted by the court below for upholding the Coal Act as applied is inconsistent with the retroactivity principles endorsed by five Justices in *Eastern*.

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[16] General labor-law and ERISA principles confirm this straightforward interpretation of the NBCWAs. *See, e.g., Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991) (employee benefits are presumed to "cease, in the ordinary course, upon termination of the [collective] bargaining agreement"); *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.) (en banc) ("Because vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly."), *cert. denied*, 118 S. Ct. 2312 (1998).

First, the Coal Act cannot be upheld on the ground (Pet. App. 29a-34a) that a "reasonable expectation" of lifetime health benefits arose from statements in the "General Description" that retirees would retain a health services card "for life" or "until death." The record in *Eastern* contained various statements by contracting parties indicating that the pre-1974 NBCWAs had "promised lifetime health benefits." *See* 118 S. Ct. at 2139 (plurality).[17] Nonetheless, five Justices held that, where the applicable contractual limitations are clear, such statements cannot support the imposition of a severe retroactive liability. The contention that employers had promised lifetime benefits, the Court concluded, "is not supported by the pre-1974 NBCWA's," and "[n]o contrary conclusion can be drawn from the few isolated statements of individuals involved in the coal industry." 118 S. Ct. at 2152 (plurality); *see id.* at 2159 (concurrence) (endorsing this reasoning). The "General Description" is analogous to these extra-contractual statements because, although it was attached to the post-1974 NBCWAs, it was plainly not a source of benefits above and beyond those specified in Article XX or in the incorporated plan documents. The "General Description" stated at the outset:

> The following is a general description of certain information contained in the [UMWA plans]. This description is intended merely to highlight certain information; it is not a complete statement of all of the provisions of the Plans and Trusts, nor is it intended to be a Summary Plan Description as defined in [ERISA], *and is qualified in its entirety by, and subject to the more detailed information contained in, the Plans and Trusts.*

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[17] For example, the president of the Southern Coal Operators' Association stated in 1953 that miners had been "'promised and grown accustomed to'" continuing health benefits, and a UMWA official stated in 1951 that miners had been promised benefits "'without limit as to duration.'" *See* 118 S. Ct. at 2166 (dissent).

E.g., Pet. App. 121a (emphasis added). Moreover, the NBCWAs contained repeated and even more emphatic statements that "[t]he specific provisions of the plans will govern in the event of any inconsistency between the general description and the plans." Pet. App. 133a, 140a, 154a, 161a. Accordingly, under the retroactivity principles adopted by five Justices in *Eastern*, the "General Description" could not support the imposition of retroactive Coal Act liability even if it did contain statements about the alleged promise of lifetime health benefits.[18]

Second, the Coal Act cannot be upheld on the ground (Pet. App. 31a-33a) that an "expectation" of lifetime benefits arose because the NBCWAs had been repeatedly renewed. Five Justices rejected that reasoning in *Eastern*, which invalidated the Coal Act as applied to a company that had signed eight NBCWAs during the eighteen years between 1947 and 1965 (*see* 118 S. Ct. at 2142-43 (plurality)). If repeated renewal of those NBCWAs was insufficient to sustain the Coal Act as applied in *Eastern*, it is also insufficient to sustain the Coal Act as applied here to Unity, which signed approximately seven NBCWAs during the fourteen years between 1947 and 1961, and three NBCWAs during the seven years between 1974 and 1981 (Pet. App. 8a-9a), and to Barnes & Tucker, which signed three NBCWAs and one "me-too" agreement during the thirteen years between 1971 and 1984 (Pet. App. 9a). In *Eastern*, five Justices plainly recognized that the imposition of retroactive liability can be justified only by reference to past commitments made by the company at issue, not by reference

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[18] The majority's interpretation of the "General Description" is untenable in any event, because the "General Description" itself confirmed that the health benefits referenced in each NBCWA were guaranteed only "during the term of this Agreement." *E.g.*, Pet. App. 129a. As Judge Aldisert charitably put it, "[t]o suggest that the clear language limiting benefits to the term of the Wage Agreement is trumped by the 'lifetime' health card is a stretch." Pet. App. 58a.

to commitments made by *other* companies in successor or predecessor agreements. *See* 118 S. Ct. at 2152 (plurality) ("the question is not whether miners had an expectation of lifetime benefits, but whether Eastern should bear the cost of those benefits"); *id.* at 2159 (concurrence) (endorsing this analysis). In other words, contrary to the decision below, the analysis of employee "expectations" cannot be divorced from the analysis of past commitments by the employer in question.

Third, the Coal Act cannot be upheld on the ground (Pet. App. 22a) that petitioners' actions "helped to create the financial crisis" in the UMWA plans. The majority reasoned that petitioners, by not signing successor NBCWAs when they "left the industry," created "obligations on the part of other companies to increase contributions to the benefit funds." Pet. App. 23a-24a. That analysis, however, presupposes that petitioners' retirees reasonably expected to receive lifetime health benefits even though petitioners and other signatories had promised to provide benefits and funding only during the term of each underlying NBCWA. As explained above, five Justices in *Eastern* squarely rejected any retroactivity analysis based on employee expectations so completely divorced from past employer promises. *See* 118 S. Ct. at 2152-53 (plurality); *id.* at 2158-59 (concurrence). The cost of providing health benefits during the term of an NBCWA reflected promises made *only* by the signatories of that particular agreement.[19]

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[19] The "financial crisis" referred to by the court of appeals arose because the 1988 NBCWA, in contrast to its predecessors, was intentionally underfunded. *See, e.g., United Mine Workers of America v. Nobel*, 720 F. Supp. 1169, 1177 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991); *UMWA 1950 Benefit Plan & Trust v. Bituminous Coal Operators' Ass'n*, 898 F.2d 177, 180-82 (D.C. Cir. 1990). As a result, the financial condition of the 1950 and 1974 Plans deteriorated from a combined surplus of $33 million in 1987, the last full year during which the 1984 NBCWA remained effective, to a combined deficit of over $109 million in 1990, mid-way through the term of the 1988 NBCWA. *See* Staff of the House Comm. on Ways & Means, 103d

Fourth, the Coal Act cannot be upheld on the ground (Pet. App. 25a) that "[t]he coal industry has been heavily regulated for decades." The same regulatory history was asserted as a ground for upholding the Coal Act in *Eastern*. *See* 118 S. Ct. at 2166-67 (dissent). Nonetheless, five Justices concluded that the extent of government involvement, at least as of 1965, could not justify the imposition of retroactive Coal Act liabilities.[20] The only significant post-1965 legal development not considered in *Eastern* was the enactment of ERISA in 1974. That event undercuts the regulated field argument even more, for the framers of ERISA made conscious decisions to create *no* "substantive entitlement to employer-provided health benefits," *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995), and to impose *no* vesting requirements on employee welfare plans such as the UMWA plans at issue here, *see, e.g.*, *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir. 1990).

Finally, the concurrence below erred in asserting that reviewing courts are powerless to look beyond the Coal Com-

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Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 9 (Comm. Print, 1993) (citing Funds' annual reports). Of course, petitioners cannot be charged with responsibility for the underfunding of an agreement to which they were not a party.

[20] The regulatory events cited by the court below were President Truman's seizure of the coal mines in 1946 and the 1948 execution of the Krug-Lewis agreement, which effectively imposed collective-bargaining terms on the mining industry. Pet. App. 4a-5a, 25a. In 1952, however, it became clear that the mine seizure had been unconstitutional, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and that the executive branch has no statutory authority to "compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements," *NLRB v. American Nat'l Ins. Co*, 343 U.S. 395, 404 (1952). Thus, even apart from *Eastern*, the events cited by the court below cannot possibly demonstrate that the coal industry was a "heavily regulated" field that petitioners entered only at their peril.

mission's mistaken conclusion that UMWA retirees had been promised "health care benefits for life" (Pet. App. 56a-57a) — even though, in fact, "the Wage Agreements expressly limited all of the promised retiree health benefits to the term of each agreement" (Pet. App. 58a). In *Eastern*, five Justices invalidated the Coal Act as applied to a company that last signed an NBCWA in 1964, despite congressional testimony from the Coal Commission's Chairman that legislation was necessary to vindicate "'promises that began in the collective bargaining process nearly 50 years ago.'" *See* 118 S. Ct. at 2141 (plurality) (quoting testimony). Those Justices did not hesitate to conclude that this mistaken assertion was "not supported" by the actual terms of the governing contracts. *See id.* at 2152; *id.* at 2159 (concurrence). Thus, a patently incorrect construction of the underlying NBCWAs is not dispositive, even if made by the Coal Commission and even if accepted by Congress.[21]

C. The constitutionality of the Coal Act as applied to signatories of the post-1974 NBCWAs is an obviously important and recurring question. This question has been frequently litigated, both before *Eastern*, *see, e.g.*, *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995), and after, *see, e.g.*, *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) (*"ABC"*); Pet. App. 1a. Indeed, this question has far more practical significance than the question whether the Coal

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[21] The court of appeals concluded that Congress's assessment of the antecedent NBCWAs was subject only to "substantial evidence" review. Pet. App. 18a-19a (majority), 56a-57a (concurrence). Judge Aldisert's analysis cannot be justified even under that deferential standard, which "does not mean" that Congress's factual determinations "are insulated from meaningful judicial review altogether." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 666 (1994). As five Justices implicitly recognized in *Eastern*, a patently incorrect construction of the antecedent NBCWAs is not "substantial" evidence.

Act is unconstitutional as applied to companies that last signed a pre-1974 NBCWA, because the vast majority of companies subject to the Coal Act are signatories of post-1974 NBCWAs. Moreover, the coal industry contains "literally thousands of individual mines" run by small companies like petitioners. Coal Comm'n Report at 9, CA3 Supp. App. at 369. As Judge Aldisert noted (Pet. App. 60a), the Coal Act threatens the very survival of these companies. The Court should grant review because of the importance of the question presented and because, as explained above, the decision below conflicts with this Court's decision in *Eastern*.

II. THE DECISION BELOW IS IMPORTANT FAR BEYOND THE SPECIFIC CONTEXT OF THE COAL ACT

The court of appeals' holding that *Eastern* contains no binding retroactivity principles raises questions with significance far beyond the specific context of the Coal Act. In *Eastern*, five Justices agreed that the Fifth Amendment provides significant protection against the operation of retroactive economic civil statutes, and further agreed on what specific protection applies in the context of retroactive employee benefits funding legislation. However, these Justices divided on whether the controlling retroactivity principles arise out of the Takings Clause or the Due Process Clause. As one commentator explained, these Justices "agreed on legal principles," and disagreed only on "doctrinal categorization." *The Supreme Court, 1997 Term — Leading Cases*, 112 Harv. L. Rev. 122, 219 (1998) (discussing *Eastern*). The court of appeals' conclusion that the operative retroactivity principles govern only *Eastern* itself and "substantially identical" cases — *i.e.*, Coal Act cases involving signatories of pre-1974 NBCWAs (Pet. App. 15a-17a) — raises troubling and important questions about the rules for construing plurality opinions of this Court and about the appropriate legal standards

for assessing the constitutionality of retroactive economic statutes.

A. The Court Should Clarify The Rules For Construing Its Own Plurality Opinions Under *Marks v. United States*

In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'" (citation omitted). The proper application of *Marks* is an important question given this Court's increasingly frequent issuance of plurality opinions.[22] The decision below raises three distinct *Marks* issues warranting this Court's review.

1. The court of appeals refused to give effect to the points of agreement between the *Eastern* plurality and concurrence. The court reasoned that, despite five Justices' agreement about the relevant retroactivity principles, "[t]here is a fundamental conceptual difference between a takings claim and a due process claim," so that a retroactivity analysis grounded in the Takings Clause is not "a more limited version" of one grounded in the Due Process Clause, or vice versa. Pet. App. 15a-16a. The court thus held that agreement over substantive "legal principles" is irrelevant under *Marks*, and that disagreement over "doctrinal categorization" is dispositive.

The court of appeals' analysis is both mistaken and troubling. It is mistaken because, where five Justices agree

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[22] During the 154 years between 1801 and 1955, the Court issued only 45 plurality opinions; by contrast, during the ten years between 1981 and 1991, the Court issued no fewer than 103 plurality opinions. *See* Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1593 n.3 (1992).

about the controlling legal principles, those principles are themselves a "common denominator" between the competing opinions, which the lower courts can readily apply even absent agreement about the "precise theoretical underpinnings." *See* J. Davis & W. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59, 72. The court of appeals' analysis is troubling because five Justices currently *agree* about the need for meaningful constitutional protection against retroactive civil statutes, even though the Court has long *disagreed* about what clause of the Constitution embodies that protection.[23] Under the court of appeals' analysis, as long as the latter disagreement persists, this Court cannot establish any legal framework for assessing the constitutionality of retroactive civil statutes, because it is impossible — regardless of the extent of agreement on the appropriate retroactivity principles — to establish a *Marks* majority for those principles. The Court should grant review either to determine what clause of the Constitution applies in these circumstances, or to confirm that agreement on that point is unnecessary to the development of a meaningful retroactivity jurisprudence.

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[23] The Court's disagreement about what clause of the Constitution affords protection against retroactive economic statutes has been longstanding. *See, e.g.*, Note, *Eastern Enterprises v. Apfel: Is the Court One Step Closer to Unraveling the Takings and Due Process Clauses*, 77 N.C. L. Rev. 1524, 1524 (1999) ("the Supreme Court has made a muddled mess of the Takings and the Due Process Clauses"); Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1607 n.40 (1988) ("judges and commentators have [not] always maintained a clear distinction between the 'due process' and 'takings' inquiries"). In *Eastern*, Justice Thomas suggested that the Ex Post Facto Clause might also apply in this context. *See* 118 S. Ct. at 2154 (concurrence). Although *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), restricted the Ex Post Facto Clause to criminal statutes, that decision presupposed (contrary to statements by the *Eastern* concurrence and dissent) that the Takings Clause does apply in this context. *See* 118 S. Ct. at 2151 (plurality).

2. The court of appeals *did* give effect to the agreement between the *Eastern* concurrence and dissent that a burden on a "specific" property interest is an essential element of any Takings Clause claim. Pet. App. 17a ("we are bound to follow the five-four vote against the takings claim in *Eastern*"). By creating a *Marks* majority out of a concurrence and dissent, the decision below conflicts both with *Marks* itself, which applies only to positions taken by Justices "'who concurred in the judgments,'" 430 U.S. at 193, and with *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc), in which the D.C. Circuit held that "we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority." Applying that principle, the *King* court expressly refused to create a *Marks* majority out of the points of agreement between the concurrence and the dissent in this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). *See* 950 F.2d at 779-85. The Court should grant review to resolve the circuit conflict between the decision below and *King*.

3. Finally, the combined effect of the court of appeals' two *Marks* rulings — giving effect to the points of agreement between the *Eastern* concurrence and dissent, but not giving effect to the points of agreement between the *Eastern* plurality and concurrence — is to adopt, as the law of the land for virtually all cases, the position urged by the *Eastern* dissent.[24]

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[24] Although the decision below would give effect to *Eastern* in the narrow range of cases involving challenges to the Coal Act brought by pre-1974 NBCWA signatories, the D.C. Circuit has refused to do even that. In *ABC*, the D.C. Circuit held that "the only binding aspect of *Eastern Enterprises* is its specific result — holding the Coal Act unconstitutional as applied to Eastern"; it held that "our basic inquiry in resolving [a] due process challenge remains the same after *Eastern* as it was before"; and it cited as valid authority several pre-*Eastern* decisions upholding the Coal Act even as applied to pre-1974 NBCWA signatories, including the reversed First Circuit decision in *Eastern* itself (which it cited as reversed "on other grounds"). *See* 156 F.3d at 1255.

That position seems to reflect not a plausible approach to *Marks*, but downright hostility to *Eastern* itself. This Court recently granted certiorari to review a similarly result-oriented application of *Marks* in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (1999) (No. 98-1161). *Pap's* involved a nude dancing ordinance similar to one that five Justices had upheld, in three fragmented opinions, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In *Pap's*, the Pennsylvania Supreme Court held that none of these opinions constituted "binding precedent" under *Marks*, and it proceeded to adopt and apply the First Amendment analysis of the *Barnes* dissent. *See* 719 A.2d at 277-79. The Court should grant review here, as it did in *Pap's*, to prevent its decisions from being so lightly disregarded.[25]

B. The Court Should Clarify The Appropriate Legal Principles Applicable To Constitutional Review Of Retroactive Economic Statutes

Under the court of appeals' conclusion that *Eastern* controls only a narrow range of "substantially identical" cases, that decision raises, but does not itself answer, a series of fundamental questions about application of the Fifth Amendment to retroactive economic statutes. This Court should grant review to establish an appropriate legal framework for such constitutional challenges, assuming that *Eastern* has not already done so.

1. After *Eastern*, the lower courts are divided about whether the burdening of a "specific" property interest is an essential element of any Takings Clause claim. Before that decision, this Court had routinely conducted a regulatory takings analysis in assessing the constitutionality of economic statutes that, like the Coal Act, impose only general monetary

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[25] Alternatively, the Court should hold this case pending its resolution of the *Marks* issues in *Pap's*.

liabilities. *See, e.g., Concrete Pipe*, 508 U.S. at 641-47; *Connolly*, 475 U.S. at 221-28. Following *Eastern*, however, at least two courts have held that a "specific" property interest is now an essential element of any Takings Clause claim. *See Parella v. Retirement Bd. of the Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 58-59 & n.10 (1st Cir. 1999); Pet. App. 15a-16a. Two other courts, however, have continued to apply a regulatory takings analysis to assess the constitutionality of statutes imposing general monetary liabilities. *See Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, No. 98-2512, 1999 WL 371671, at *7-*9 (7th Cir. June 9, 1999) (MPPAA liability); *Vermont Assembly of Home Health Agencies, Inc. v. Shalala*, 18 F. Supp. 2d 355, 369 (D. Vt. 1998) (Medicare liability). The Court should grant review to address that important takings question.

2. As construed below, *Eastern* also creates substantial uncertainty regarding the appropriate parameters for due process challenges to retroactive economic statutes.

Prior to *Eastern*, the Court had not struck down a retroactive economic statute on due process grounds in over six decades. *See Eastern Enterprises v. Chater*, 110 F.3d 150, 158-59 (1st Cir. 1997) (citing *Railroad Retirement Board v. Alton R.R. Co.*, 295 U.S. 330 (1935)), *rev'd*, 118 S. Ct. 2131 (1998). Moreover, this Court's retroactivity precedents were dominated by sweeping, and as a practical matter dispositive, statements that statutes "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality," *Turner Elkhorn*, 428 U.S. at 15, and that retroactivity need only be "justified by a rational legislative purpose," *Gray*, 467 U.S. at 730. *See also* L. Tribe, *American Constitutional Law* 622 (2d ed. 1988) (noting "minimal review" standard applied in *Turner Elkhorn*). Not surprisingly, the lower courts had unanimously concluded that the Coal Act was constitutional in all of its possible applications. *See* Brief

For Respondents UMWA Combined Benefit Fund and its Trustees at 31 & n.31, *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998) (No. 97-42).

In *Eastern*, however, the Court substantially changed its emphasis and tone. For the first time ever, five Justices incorporated into a constitutional analysis the principle, developed in this Court's recent statutory presumption cases, that "[r]etroactivity is generally disfavored." 118 S. Ct. at 2151 (plurality) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)); *id.* at 2159 (concurrence) ("retroactive lawmaking is a particular concern") (citing *Landgraf*).[26] And, for the first time in decades, the Court actually invalidated a retroactive economic statute.

The Court should grant review to determine whether due process or other constitutional challenges to retroactive economic statutes should be governed by a strong "presumption of constitutionality" (*Turner Elkhorn*, 428 U.S. at 15), as they routinely were prior to *Eastern*, or whether, as five Justices concluded in that case, such challenges should be governed by the reverse presumption that "[r]etroactivity is generally disfavored" (118 S. Ct. at 2151).

* * * *

By diminishing *Eastern* to a precedent only for "substantially identical" cases, and by upholding application of the Coal Act in this case, the court of appeals has made *Eastern* effectively meaningless and has announced that there are virtually no limits on the government's ability to appropriate private property by imposing retroactive monetary liabilities. Under the decision below, private parties need only tell Congress that they

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[26] Although the plurality engaged in only a Takings Clause analysis, it substantially relied, as Justice Kennedy noted, on due process precedents. *See* 118 S. Ct. at 2158 (concurrence).

expected to be given money or benefits from other private parties, even if their "expectation" has no basis in any prior law, contract, promise, or injury. The Court should grant review because its obvious concern about unfair retroactivity has been inverted and because, if that concern had been given effect in this case, the Coal Act would plainly have been invalidated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 28, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

UNITY REAL ESTATE COMPANY,
Appellant No. 97-3234,
v.
Marty D. HUDSON; Michael H. Holland;
Thomas O.S. Rand; Elliott A. Segal;
Carlton R. Sickles; Gail R. Wilensky;
William P. Hopgood; Trustees of the
United Mine Workers of America Combined Benefit
Fund; Thomas F. Connors;
Roberts Wallace; Trustees of the 1992
United Mine Workers of America Benefit
Plan; United States of America
(Intervenor in District Court); LTV Corporation
(LTV), NACCO Industries, Inc.
(NACCO), Amicus Curiae.

BARNES AND TUCKER COMPANY, Appellant No.
97-3236,
v.
Marty D. HUDSON, Trustee of the United Mine
Workers of America Combined Benefit
Fund and Trustee of the 1992 United Mine
Workers of America Benefit Plan;
Michael H. Holland, Trustee of the United Mine
Workers of America Combined
Benefit Fund and Trustee of the 1992 United
Mine Workers of America Benefit
Plan; Thomas O.S. Rand, Trustee of the United Mine
Workers of America Combined
Benefit Fund; Elliott A. Segal, Trustee of the
United Mine Workers of America
Combined Benefit Fund; Carlton R. Sickles,
Trustee of the United Mine Workers
of America Combined Benefit Fund;

Gail R. Wilensky, Trustee of the United Mine Workers of America Combined Benefit Fund; William P. Hopgood, Trustee of the United Mine Workers of America Combined Benefit Fund; Thomas F. Connors, Trustee of the 1992 United Mine Workers of America Benefit Plan; Robert G. Wallace, Trustee of the 1992 United Mine Workers of America Benefit Plan; United States of America (Intervenor in the District Court); LTV Corporation (LTV), NACCO Industries, Inc. (NACCO), Amicus Curiae.

Nos. 97-3234, 97-3236.

Decided March 29, 1999.

Before: BECKER, Chief Judge, ALDISERT and WEIS, Circuit Judges.

OPINION OF THE COURT

BECKER, Chief Judge.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed.2d 451 (1998), the Supreme Court held unconstitutional the portion of the 1992 Coal Industry Retiree Health Benefit Act (Coal Act), 26 U.S.C. §§ 9701- 9722 (1994 & Supp. II), that required former coal mine operators to pay for health benefits for retired miners and their dependents, as applied to a former operator who last signed a coal industry benefit agreement in 1964. In this case, we are asked to apply *Eastern* to former coal mine operators who were signatories to coal industry agreements in 1978 and thereafter. *Eastern* was decided by a sharply divided Court, and the parties disagree as to what, if any, principles commanded a majority.

The plaintiffs, Unity Real Estate ("Unity") and Barnes & Tucker Co. ("B & T"), challenge the Coal Act as applied to

them as both a violation of substantive due process and an unconstitutional uncompensated taking. Although it is an exceedingly close question, and we are highly sympathetic to plaintiffs' unfortunate situation, in which retroactively imposed liability operates to bind them to commitments they had thought satisfied when they left the coal industry, we conclude that the Act is constitutional as applied to these plaintiffs. Accordingly, their recourse must be to Congress rather than to the courts.

First, we conclude, albeit with substantial hesitation, that the Coal Act does not violate due process. Our due process inquiry proceeds in two parts. We acknowledge at the outset that there is a gap between what the contracts between the union and the mining companies required and what the Coal Act now mandates from those former mining companies. Because this is a substantive due process challenge, we accord deference to Congress's judgments, based on the report and recommendations of the Coal Commission. While reasonable minds could differ on the point, we are satisfied that the agreements signed by the plaintiffs in 1978 and thereafter promised that miners and their dependents would receive lifetime benefits from the benefit funds, and that, at all events, these agreements informed reasonable expectations that the benefits would continue for life. Similarly, we conclude that it was reasonable for Congress to conclude that the plaintiffs' withdrawal from the funds contributed to the funds' financial instability, though the agreements themselves permitted withdrawal. The history of coal mining in this country also supports Congress's decision to step in when the funds that provided health benefits to retired miners began to falter.

The question we must then answer is whether those congressional judgments provide enough of a rationale for closing the gap between the contracts and the needs of the benefit funds through the mechanism of the Coal Act. Consistent with our due process jurisprudence, we ask whether

the Coal Act was a rational response to the problems Congress identified, taking into account the Act's retroactivity, which is highly disfavored in our legal culture. In light of Congress's findings and in the context of extensive government regulation of the coal industry, we hold that it was not fundamentally unfair or unjust for Congress to conclude that the former coal companies should be responsible for paying for such benefits, even if they were no longer contractually obligated to pay into the benefit funds. The retroactive scope of this enactment, especially as applied to plaintiff Unity (eleven years), approaches the edge of permissible legislative action, but we cannot say that the law is beyond the legislative power.

We also decline to find a compensable taking on the ground that the Coal Act will put the plaintiffs out of business, because it is contrary to the reasoning of a majority of the Supreme Court in *Eastern*. Moreover, granting relief whenever a plaintiff could credibly argue that it would be driven out of business by a regulation would create major difficulties in evaluating the constitutionality of much modern legislation. We therefore decline to construe this regulatory burden as a "categorical taking" analogous to the total destruction of the value of a specific piece of real property.

I. FACTS AND PROCEDURAL HISTORY

A. History of the Coal Act

1. Early Agreements in the Coal Industry

The history behind the Coal Act has often been discussed in the pages of the federal reporters. *See, e.g., Eastern*, 118 S. Ct. at 2137-42 (plurality). Briefly, the relevant facts are as follows: The coal industry has witnessed a series of particularly vitriolic labor disputes over the past halfcentury. In 1946, motivated principally by miners' demands for decent health and retirement benefits, the United Mine Workers of America ("UMWA") called a nationwide strike. To forestall industrial paralysis, President Truman nationalized the coal mines.

Following the execution of what came to be known as the Krug-Lewis Agreement, the government relinquished control of the mines. The UMWA and the Bituminous Coal Operators' Association ("BCOA"), a multiemployer group of coal producers, then executed the first National Bituminous Coal Wage Agreement ("NBCWA"). The 1947 NBCWA specified terms and conditions of employment in the mines and, among other things, extended the Krug-Lewis Agreement by providing health and pension benefits to miners.

A new NBCWA signed in 1950 provided that, in exchange for union concessions, the BCOA would create a welfare and retirement fund financed by a per ton levy on coal mined by signatory coal producers. The 1950 Fund was designed to receive employer contributions and to use the funds to provide health benefits to current and retired miners (and, in certain cases, to family members). Several more NBCWAs were signed over the next two decades. None of them altered this basic benefits format, although beginning in 1971 the UMWA and the BCOA were given power over the levels of benefits provided under the 1950 Fund, removing discretion formerly vested in the Trustees of the Fund. *See In re Chateaugay Corp.*, 53 F.3d 478, 482 (2d Cir. 1995).

2. The 1974 Agreement

In 1974, demographic changes that had increased the cost of benefits, along with the passage of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, led to a restructuring of the 1950 Fund. In its place, the 1974 NBCWA established four separate multiemployer plans, two covering pension benefits and two dealing with nonpension benefits. The nonpension entities were the 1950 Benefit Plan, which provided health benefits to coal workers who retired before 1976, and the 1974 Benefit Plan, which covered those who retired on or after January 1, 1976. The 1974 NBCWA explicitly guaranteed that miners and their dependents would retain their health services cards — which gave them access to

Plan health benefits — "for life." No such express warranty had appeared in any earlier agreement. We will discuss these changes in more detail below. *See infra* Part III.

3. The 1978 Agreement

In response to continued labor unrest and unresolved concerns over benefits, the 1978 NBCWA incorporated a new provision assuring health care for "orphaned" miners (that is, miners whose employers had abandoned either the coal industry or the UMWA), together with complementary "guarantee" and "evergreen" provisions. The "guarantee" clause obligated signatories to make sufficient contributions to maintain benefits at the negotiated levels during the period of agreement, whereas before there had been no promise to maintain any particular benefit level. The "evergreen" clause required signatories who continued to mine coal to continue making benefit contributions for as long as such contributions were required by future NBCWAs, regardless of whether a particular operator actually signed those subsequent NBCWAs. Additionally, the 1978 NBCWA for the first time defined specific health benefits that would be covered, a practice that continued in later agreements. Finally, for miners leaving covered service on or after January 1, 1976, primary responsibility for retiree health care coverage was shifted from the UMWA multiemployer system to individual coal companies, with the 1974 Plan retained as an "orphan" plan for retirees whose former employers went out of business.

4. The Coal Commission

The economic problems that prompted the remedial measures in the 1974 and 1978 NBCWAs continued to plague the industry. In particular, the cost of health care rose steeply throughout the 1980s, the number of orphaned miners increased dramatically as more and more employers left the industry, and an aging population swelled the retired miners' ranks. By 1990, contributions from a shrinking number of coal

producers proved insufficient to fund the four benefit plans, and those plans were awash in red ink.

The UMWA struck the Pittston Coal Company for nearly 11 months in 1989-90. The Secretary of Labor intervened, brokered a rapprochement, and, as part of the negotiated settlement, set up a commission to study the industry's problems and recommend ways of rejuvenating the benefit plans. The Coal Commission issued its report in late 1990. Congress's response to the commission's suggestions took the form of the Coal Act. The Act folded the 1950 and 1974 Plans into a single UMWA-sponsored entity (the Combined Fund) and wove an elaborate tapestry designed to ensure that all retirees who were eligible to receive health benefits from the preexisting Plans would obtain them from the Combined Fund. The Act also created the 1992 Plan, which was designed to provide benefits to eligible retirees and their dependents who were not beneficiaries of the Combined Fund and who were not receiving health care coverage directly from former employers.

The linchpin of the statutory scheme is contained in section 9706 of the Coal Act, which directs the assignment by the Social Security Commissioner of every eligible beneficiary to a "signatory operator" who is still "in business." The signatory operator ("SO") must have signed at least one NBCWA and must pay premiums to the Combined Fund sufficient to defray the estimated annualized health care costs for its assigned beneficiaries. *See* 26 U.S.C. § 9704.[1] A retired miner is assigned first, if possible, to the SO that both signed the 1978 (or any subsequent) NBCWA and also employed him for at least two years more recently than any other SO. *See id.*

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[1] The law also provides that SOs must pay an additional amount, proportional to the number of initial assignments, to provide coverage for orphaned retirees. However, it has apparently not proven necessary to assign SOs responsibility for orphaned retirees because of the availability of other funding sources. *See Eastern*, 118 S. Ct. at 2142 n. 3 (plurality).

§ 9706(a)(1). If no SO fits that description, the retired miner is assigned to the 1978 (or any subsequent) SO that employed him most recently for any length of time. *See id.* § 9706(a)(2). If the retired miner never worked for a 1978 or subsequent SO that is still in business, he is assigned to the SO that employed him for the longest period of time. *See id.* § 9706(a)(3).

B. The Parties

1. Unity

Unity is a corporation owned by members of the Jamison family. Unity is covered by the Coal Act as a "related person" to several companies — formed by members of the Jamison family — that were ultimately absorbed into Unity. One, South Union-PA, had been mining coal since 1923 and signed the 1947 NBCWA and amendments thereto through 1961. South Union-WVA, which took up mining when South Union-PA left off, signed the 1974, 1978, and 1981 NBCWAs, although a bankruptcy court granted it leave to reject the 1981 NBCWA in 1981. Yet another Jamison company, Stewart Coal & Coke Co., paid into the UMWA benefit funds from 1949 to 1958; when it ceased operations, it stopped paying into the benefit funds, but its former employees continued to receive benefits from the Funds. Other related companies signed NBCWAs and paid into UMWA benefit funds at various times from the 1960s through the 1970s.[2]

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[2] While attempting to distance itself from liability, Unity and its owners have not ignored the benefits of close corporate relationships. Although we do not suggest that it acted with bad faith, we note that Unity repaid the Jamison family over $230,000 from promissory notes given by Stewart Coal & Coke, which merged with Unity in 1969 (over $150,000 on those notes was paid in 1992 and 1993), and that Unity sheltered $288,000 in income from federal income tax because of net operating loss carryover from South Union-WVA's bankruptcy. At all events, Unity has never presented any legal challenge to the "related persons" provision of the Act, and hence its obligations must stand or fall regardless of how Unity was assigned the beneficiaries.

Unity currently owns a small commercial building and parking lot in Greensburg, Pennsylvania and employs two individuals, a corporate officer who earns $7,000 per year and a janitor. Its annual gross revenues are approximately $50,000 and its net worth is approximately $85,000. Unity was assigned 74 beneficiaries of the Combined Fund and owed the Fund, as of September 30, 1995, over $440,000 in unpaid premiums. In addition, Unity was assigned 2 beneficiaries of the 1992 Plan and, as of January 31, 1996, owed that Fund over $18,000. The assignment was based upon Unity's prior employment of 63 miners, who had worked for Unity and its related companies, on average, for ten years.[3] Unity represents that its Coal Act liabilities are over six times its total assets and that, if forced to pay, it will be bankrupted. These representations are not disputed by the Trustees.

2. B & T

B & T was assigned 1544 Combined Fund beneficiaries and some twenty 1992 Plan beneficiaries. B & T had been, from 1905 on, engaged in large scale coal production until closing its last mining operation in 1986. It terminated an agreement to manage a mine effective January 1, 1987. At the peak of its coal mining operations from the 1970s to the 1980s, B & T employed approximately 1100 UMWArepresented miners. B & T was a party to the 1971, 1974, 1978, and 1981 NBCWAs through its membership in the coal operators' association. Although it withdrew from the association prior to the 1984 NBCWA, it later agreed to be bound by that NBCWA on a "me-too" basis, adhering to the Agreement's requirements. Its participation in the NBCWA terminated in 1988. At that time, B & T discontinued its individual employer plan and its retirees were left to be covered by the 1974 Benefit Plan (the "orphan" plan).

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[3] Thirty miners had worked for the companies for more than ten years and thirteen for more than fifteen years.

B & T's activities are currently confined to leasing its coal reserves, paying workers' compensation and black lung claims, and treating acid mine drainage from its closed mines. B & T claims that if it is forced to continue paying its Coal Act liabilities, all of its assets will be consumed in less than two years, and this is not in dispute.

C. Procedural History

The plaintiffs challenge the constitutionality of the Coal Act as it applies to them (§ 9706(a)(1) & (2)). Both moved for preliminary injunctions to prevent the Trustees of the funds to which the plaintiffs are required to pay under the Coal Act from enforcing the Coal Act against them during the pendency of these cases. B & T withdrew its motion for a preliminary injunction, and the District Court granted Unity's motion for a preliminary injunction. The court rejected Unity's Due Process Clause argument but granted the requested interim relief on Takings Clause grounds. *See Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818 (W.D.Pa. 1995). All parties moved for summary judgment. The District Court, reconsidering its views of the merits, granted the defendants' motions for summary judgment and denied Unity's and B & T's motions for summary judgment. Unity and B & T appeal.

II. THE EASTERN DECISION

A. The Rationales

Eastern Enterprises was involved in coal mining until 1965, and signed every NBCWA from 1947 until 1964. It was assigned liability for over 1000 miners, based on Eastern's status as the pre-1978 signatory for whom the miners had worked for the longest period of time; its total liability was estimated to be between $50 and $100 million. Eastern sued, claiming that the Coal Act was unconsititutional.

Four Justices concluded that the Act was a compensable taking as to Eastern. In practical terms, this meant that the Act

was unconstitutional: Compensation for the taking would be the return of sums required to be paid by the Act. Although the law did not work a physical invasion, the plurality noted that economic regulation can constitute a taking. *See Eastern*, 118 S. Ct. at 2146 (plurality). The plurality looked to three factors of particular significance in determining whether a taking had occurred: the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the retroactive character of the government action. *See id.* (plurality).

The plurality examined several previous cases to set the stage for its analysis. It looked to *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed.2d 752 (1976), where the Court upheld provisions of the Black Lung Benefits Act, which required coal operators to compensate miners and their survivors for death or disability due to mining-related black lung disease. The Eastern plurality explained that Usery upheld that law because, even though "stricter limits may apply to Congress' authority when legislation operates in a retroactive manner," holding the companies liable for black lung benefits was justified as a rational measure to spread the costs of black lung to companies that profited from the miners' labor. *Eastern*, 118 S. Ct. at 2147 (plurality).

Next, the plurality considered *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed.2d 601 (1984), where the Court upheld the Multiemployer Pension Plan Amendments Act (MPPAA), which was enacted to supplement ERISA. ERISA had created the Pension Benefit Guaranty Corporation to exercise discretionary authority to pay benefits when a multiemployer pension plan terminated. The Corporation also had authority to require employers who had contributed to the plan during the five years before its termination to pay for an amount proportional to their share of contributions to the plan during

that five year period. As ERISA's effective date approached, many multiemployer pension plans were in a precarious position, and so Congress enacted the MPPAA, which imposed a payment obligation upon any employer withdrawing from such plans. The obligation depended on the employer's share of the plan's unfunded vested benefits.

The MPPAA applied retroactively to withdrawals within the five months preceding its enactment. The *Eastern* plurality explained that the Court upheld the MPPAA because retroactive liability prevented employers from taking advantage of a lengthy legislative process by withdrawing before Congress revised the law. The retroactivity in *Gray*, the *Eastern* plurality emphasized, was short, and limited to the needs generated by the delays inherent in the legislative process. *See Eastern*, 118 S. Ct. at 2147 (plurality).

The plurality then reviewed *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed.2d 166 (1986), where the MPPAA was again at issue, this time as the subject of a takings challenge. The Eastern Court explained that *Connolly* upheld the law despite the employers' expectations that they would not have to pay, because "legislation is not unlawful solely because it upsets otherwise settled expectations." *Eastern*, 118 S. Ct. at 2148 (plurality). Even though the employers in *Connolly* had contractual agreements expressly limiting their contributions to the pension plan, the Court held that their express contracts could not impair Congress's authority. *See Connolly*, 475 U.S. at 223-24. The *Connolly* Court noted that the MPPAA did not work a physical invasion. Although the economic impact of the law was substantial, the amount was directly related to the previous relationship between the employer and its pension plan, and therefore the economic impact factor did not establish that a taking had occurred. *See id.* at 225. Moreover, there was no interference with reasonable investment-backed expectations, because at the time the MPPAA was enacted, prudent

employers had notice that pension plans were regulated and that withdrawal might trigger additional financial obligations. *See id.* at 227.

The third time was not the charm for the MPPAA's challengers in *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed.2d 539 (1993). In that case, the employer focused on the fact that its contractual commitment to its pension plan did not impose withdrawal liability. The Court rejected the claim that the contract made a difference and reiterated its holding that there was no taking as long as an employer's liability would generally not be "'out of proportion to its experience with the plan.'" *Id.* at 645 (*quoting Connolly*, 475 U.S. at 226). Although the employer's liability under the MPPAA exceeded ERISA's original cap on withdrawal liability, the Court found "no reasonable basis to expect that [ERISA's] legal ceiling would never be lifted." *Id.* at 646. The employer voluntarily negotiated a plan within ERISA's scope, making its burden under the MPPAA neither unfair nor unjust. *See id.* at 646-47.

The *Eastern* plurality summarized this line of cases as follows:

> Our opinions in *Turner Elkhorn*, *Connolly*, and *Concrete Pipe* [ ] make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress also may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation." Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

Eastern, 118 S. Ct. at 2149 (plurality) (citation omitted). The plurality held that the Coal Act, as applied to Eastern, presented such an extreme case.

On the economic impact factor of the takings test, the plurality found "no doubt that the Coal Act has forced a considerable financial burden upon Eastern," between $50 and $100 million. *Id.* (plurality). The plurality referred to previous cases requiring that liability be proportional to a party's experience with the object of the challenged legislation. In the pension plan cases, the parties had voluntarily negotiated and maintained pension plans, at least for a while, and consequently their statutorily imposed liability was linked to their own conduct. *See id.* at 2149-50 (plurality). Eastern did not participate in the negotiations for the 1974 or subsequent NBCWAs, nor did it agree to make contributions thereunder. "[The 1974, 1978, and subsequent agreements] first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members." *Id.* at 2150 (plurality).

The plurality then concluded that the Coal Act substantially interfered with Eastern's reasonable investment-backed expectations. *See id.* at 2151 (plurality). It reasoned that retroactivity is generally disfavored in the law, and that the length of the period of retroactivity and the extent of Eastern's liability raised substantial questions of fairness. *See id.* at 2152 (plurality). Finally, the plurality found the nature of the government action to be quite unusual, because the liability imposed was substantial, based on conduct thirty to fifty years in the past, and unrelated to any commitment Eastern made or injury it caused. *See id.* at 2153 (plurality).

The plurality declined to reach Eastern's substantive due process argument, although it noted that takings and due process analyses are often correlated. *See id.* (plurality); *see also Connolly*, 475 U.S. at 223. The plurality reiterated the Court's past concerns about using the "vague contours" of the

due process clause to nullify laws. *Eastern*, 118 S. Ct. at 2153 (plurality) (citation omitted). Justice Thomas agreed with the plurality's Takings Clause analysis but wrote separately to reaffirm his belief that the Ex Post Facto Clause would also apply to Eastern's predicament. *See id.* at 2154 (Thomas, J., concurring).

Justice Kennedy concurred in the judgment, providing the critical fifth vote to strike the law down as applied to Eastern. He found takings analysis inapplicable: "The Coal Act imposes a staggering financial burden on the petitioner . . . but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest." *Id.* at 2154 (Kennedy, J., concurring). Instead, he emphasized the law's distaste for retroactivity and found that the Coal Act's extreme retroactivity violated due process as applied to Eastern. *See id.* at 2158-59 (Kennedy, J., concurring). When the Court upheld retroactive legislation in the past, he noted, the statutes at issue were "remedial, designed to impose an actual, measurable cost of [the employer's] business which the employer had been able to avoid in the past." *Id.* at 2159 (Kennedy, J., concurring) (citation and internal quotation marks omitted) (alteration in original). Justice Kennedy concluded that "[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances. This case represents one of the rare instances in which even such a permissive standard has been violated." *Id.* (Kennedy, J., concurring).

Four Justices dissented, finding neither a taking nor a due process violation.

B. Drawing Instruction from *Eastern*: Does It Control This Case?

The splintered nature of the Court makes it difficult to distill a guiding principle from *Eastern*. There are five votes against

the plurality's Takings Clause analysis. However, Justice Kennedy's substantive due process reasoning is not a "narrower" ground that we might take to constitute the controlling holding. There is a fundamental conceptual difference between a takings claim and a substantive due process claim. If the government pays just compensation, it may take property for public use under the Takings Clause. Due process protections, by contrast, define what the government may not require of a private party at all. It is the difference between a liability rule and a property rule. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L.Rev. 1089 (1972); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L.Rev. 61, 66 (1986). To be sure, in this case the result of the two claims would be the same because the only potential taking is the imposition of a monetary obligation, but neither constitutional ground is a more limited version of the other.

Amici, other former coal companies, submit that the holding of Eastern is that employee benefits funding legislation is unconstitutional if it imposes substantial retroactive liability on selected employers, and if that liability is unrelated to injuries caused or promises made by those employers. While this may be reasonably accurate in a general sense, it does not provide guidance for determining how substantial is too substantial or how tight the fit between parties' past acts and the liability imposed on them must be. Nor does it help define an intersection between substantive due process and takings law, as the word "unconstitutional" is here being used to cover, if not a multitude of sins, at least two.

Eastern, therefore, mandates judgment for the plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence. *See Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir.

1998) [*ABC, Inc.*] (reaching the same conclusion about *Eastern*). In addition, we are bound to follow the five-four vote against the takings claim in *Eastern*, although we will consider plaintiffs' "categorical takings" claim, not presented in *Eastern*, in greater detail *infra* Part IV.

Because the plaintiffs signed NBCWAs in 1974 and thereafter, they are factually distinguishable from *Eastern Enterprises*. Language in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 supports our conclusion. *See Eastern*, 118 S. Ct. at 2150 (plurality) ([The 1974, 1978, and subsequent agreements] first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.); *id.* at 2159 (Kennedy, J., concurring); *see also id.* at 2161 (Stevens, J., dissenting) (stating that the miners' and operators' "implicit agreement was made explicit in 1974"). Although we recognize that the Court was not presented with argument focused on post-1978 signatories and thus may not have had before it all the available evidence about later contracts, that very distinction compels the conclusion that *Eastern* is not on all fours with the case before us.

To the extent that *Eastern* embodies principles capable of broader application, we believe that due process analysis encompasses the relevant concerns. We must identify a set of calipers with which to evaluate the challenged provisions of the Coal Act, and we believe that the relevant measurement is the extent of the gap between the coal companies' contractual promises to the Funds and the requirements of the Coal Act. In making our decision, we first give deference to Congress's determination of the problem to be addressed, and then ask whether Congress's solution comports with fundamental principles of due process.

III. RETROACTIVITY AND DUE PROCESS

A. The Standard of Review

The standard of review when a substantive due process violation is alleged is forgiving; it bars only arbitrary and irrational congressional action. At the same time, our legal system has a long-standing and well-justified distaste for retroactive laws, because of their heightened potential for unfairness. *See, e.g., Eastern*, 118 S. Ct. at 2158 (Kennedy, J., concurring) (discussing our "singular distrust of retroactive statutes"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed.2d 493 (1988).

The situation is not unlike that faced in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed.2d 369 (1997). In *Turner*, a case involving a First Amendment challenge to Congress's regulation of cable systems, the Court applied intermediate scrutiny and required substantial evidence justifying Congress's conclusion that regulation was necessary, but nonetheless emphasized the importance of deference to Congress:

> Our sole obligation is "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." . . . [S]ubstantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency. We owe Congress' findings deference in part because the institution "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. This principle has special significance in cases, like this one, involving congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change. Though different in degree, the deference to Congress is in

> one respect akin to deference owed to administrative agencies because of their expertise. This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

Id. at 1189 (citations omitted).

While we are not applying a First Amendment test to this due process claim, we consider *Turner* instructive in a situation such as this, where both careful scrutiny of the retroactivity involved and deference to the legislature's judgments about cognizable harms and appropriate remedies are in order. We must decide whether sufficient evidence exists to support Congress's judgment that post1978 signatories of NBCWAs could justly be charged with responsibility for retirees' health benefits, based on the promises they made to coal miners and on the effects of their departure from the industry on the Funds. *See also Concrete Pipe*, 508 U.S. at 639 (Congress's judgment receives deference even when its retroactive solution to a problem has some weaknesses). We will then evaluate whether it was rational for Congress to legislate to close the gap between the coal companies' promises and their contractual obligations, taking into account the retroactivity of the law.

B. Does the Evidence Support Congress's Conclusion that the Coal Companies Should Be Held Responsible?

1. The Relationship Between Benefits and Work Performed by Miners

Before we address the problems occasioned by the mass departure of coal companies from the industry in the 1980s and the expectations created by the NBCWAs, we must first dispose of the plaintiffs' argument that the Coal Act is unjustified because it charges them with financial responsibility for non-coal-mining-related health problems.[4]

The plaintiffs submit that their liability is disproportionate to their actual responsibility because they are required to pay for miners' dependents and for all health conditions, however unrelated to mining work. Thus, they conclude, their liability does not depend in any rational way on benefits they received from the miners' work in the mines. That the company may be responsible for a miner's entire family does not make the burden unrelated to past benefits, however. While it is true that

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[4] The plaintiffs further argue that there is no reasonable relationship between their potential liability and the former employment relationships; they are responsible for the miners' dependents even if the miners only worked for them a day. This argument is skewed. In fact, the miners for which the plaintiffs are responsible worked for the plaintiffs, on average, for many years. There is no evidence in the record to suggest that the plaintiffs' hypothetical ever occurred; instead, the evidence indicates that Congress correctly found that many beneficiaries were entitled to benefits based on miners' long years of service with particular companies. Furthermore, one day of work would not qualify a miner for benefits under the statute, since a miner must work for twenty years in the industry or be disabled in the course of employment to qualify for benefits. *See* 26 U.S.C. § 9703(f); *In re Chateaugay*, 53 F.3d at 489. In combination with the statutory scheme of assigning beneficiaries to the SO for whom a covered miner worked longest, this initial eligibility requirement guards against the disquieting result posited by the plaintiffs.

a miner's virility may have little to do with his productivity, the post-1978 agreements clearly provided for family coverage; when those agreements were signed, the companies could predict, with some actuarial reliability, their responsibilities for family benefits. Coverage for dependents was the price of labor peace, and the companies received a benefit from the promise of that coverage. *See Nobel*, 720 F. Supp. at 1178.

Proportionality does not require that the burdened parties have physically injured the beneficiaries of a retroactive law. The *Eastern* plurality relied on a concatenation of circumstances to find a lack of proportionality: First, the benefits were not related to workrelated injuries, and, second, the benefits were not related to anything Eastern Enterprises ever promised. In *Usery*, the black lung benefit case, only the first factor was present and the law was upheld as proportional, while in *Connolly* only the second factor was present and the law was also upheld. Those cases demonstrate that the necessary proportionality may be of either type, and there is no need for both to be present. The argument to the contrary limits the coal companies' responsibility for their past actions to physical events. It makes more sense to recognize the relevance of the companies' promises and negotiations with the miners, especially since the NBCWAs were just as necessary to the companies' continued operations as blasting or digging.

2. Responsibility for the Funds' Instability

The defendants argue that B & T's and Unity's liability to the Funds is proportional to their general experience in the coal industry. The companies have only been assessed liability based on the miners they actually employed, and those miners' dependents. The *Eastern* plurality considered the former employment relationship alone insufficient because the employers had not promised lifetime benefits, at least until 1974, years after Eastern left the industry. *See Eastern*, 118 S. Ct. at 2150 (plurality). Unlike Eastern, however, Unity and B & T, as BCOA members, at some points in time negotiated

for and adhered to the very agreements that established the benefit funds at issue. Like the employers in *Concrete Pipe* and *Connolly*, their liability is linked to their voluntary negotiation of a benefit plan, even though Congress retroactively increased the costs of that negotiation. *See Eastern*, 118 S. Ct. at 2149-50 (plurality).

Moreover, it can credibly be contended that the departure of companies such as Unity's subsidiaries and B & T helped to create the financial crisis in the plans that ultimately led to the Coal Act. When B & T, along with several other employers, left the industry, litigation ensued. *See United Mine Workers v. Nobel*, 720 F. Supp. 1169 (W.D.Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir. 1990). As a consequence, the B & T retirees' benefits became funded by the 1974 Plan for orphaned miners. After these events, the Plan had to borrow funds and remaining employers were required to increase their contribution rates to make up the shortfall. Similarly, when South Union-WVA declared bankruptcy, it informed the Funds that it was no longer in business and would no longer provide health benefits for its retirees. As Mr. Jamison contemplated when he notified the Trustees that South Union-WVA had shut down, see J.A. at 170, the 1974 Fund was forced to take responsibility for those retirees. *See Schifano v. United Mine Workers 1974 Benefit Plan & Trust*, 655 F. Supp. 200 (N.D.W.Va. 1987) (litigation arising out of South Union-WVA's bankruptcy). Thus, the plaintiffs' acts increased the burden on the Fund, contributing to its overstressed state, at least to some degree.

Although the Fund may, as plaintiffs argue, have been financially stable when the plaintiffs left the industry, it was surely foreseeable that departures would lead to instability, given the benefit funding structure under the NBCWAs. While the plaintiffs contend that the benefit funds only became unstable after the plaintiffs left the industry and there were changes in the contribution levels required from coal operators who remained in the industry, it was also foreseeable that those

contribution levels could change, and it was the NBCWAs to which the plaintiffs adhered that initially created a system vulnerable to such changes. It was thus rational to conclude that operators in this position should bear some responsibility for the costs of the corrective legislation. "It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States v. Sperry Corp.*, 493 U.S. 52, 65, 110 S. Ct. 387, 107 L. Ed.2d 290 (1989).

The plaintiffs argue that holding them responsible for the benefit funds' financial instability because they left the coal industry would obligate every operator to remain in the industry no matter how unprofitable mining became, which amounts to an "erosion taking." We disagree, since this is simply a variant of the total takings claim that we reject below. The law does not require the plaintiffs to stay in any business, which was a necessary element of all the prior "erosion taking" cases. *See, e.g., Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 399, 40 S. Ct. 183, 64 L. Ed. 323 (1920) (legislature cannot require a company to continue doing business, though it may require the company to fulfill its legal obligations if it chooses to continue operations). Instead, the Coal Act merely recognizes that all acts have consequences, and that sometimes it is not permissible for a company simply to walk away, leaving its former employees in the lurch.

In *ABC, Inc.*, the Court of Appeals for the D.C. Circuit relied heavily on the distinction between pre-1974 participation in the coal industry and post-1974 participation. The court found the distinction relevant for two reasons: the post-1974 agreements began the explicit promises of lifetime benefits, a matter we take up below, and also created a funding structure that allowed (or even induced) companies to leave the industry and slough off the burden of their retirees' benefits on the remaining companies. Before 1974, a company that left the

industry did not create any obligations on the part of other companies to increase contributions to the benefit funds, but after 1974 that changed. Judge Silberman reasoned persuasively:

> [I]t is surely rational for the Congress to expect that the member companies' failure to contribute while their retirees received benefits contributed to the underlying crisis that the plans faced in the late 1980s. Although the coal contractors may not have been the dominant cause of that underfunding, legislation need not burden the most responsible party to survive rational basis review.

ABC, Inc., 156 F.3d at 1255-56.

ABC, Inc. also found that Justice Kennedy's additional concern that liability imposed based on a past employment relationship should be "remedial" was satisfied for employers who, unlike Eastern, withdrew from the industry after the 1974 agreements. Such employers "withdrew from their prior commitment to contribute to the funds at precisely the point in time . . . at which the benefit obligation dramatically expanded, and therefore 'contributed to the perilous financial condition of the 1950 and 1974 plans which put the benefits in jeopardy.'" *Id.* at 1257 (*quoting Eastern*, 118 S. Ct. at 2159 (Kennedy, J., concurring)).

Unlike Eastern, Unity and B & T, as BCOA members, participated in the negotiations that created the post-1978 funding structure. They benefited from the NBCWAs by obtaining labor peace. Although the contract allowed the companies to unload their obligations to the retirees onto the Trustees, they should reasonably have anticipated that such a strategy would threaten the Funds and might well prompt a congressional response. We cannot say that it was irrational for Congress to charge the miners' former employers with the costs of their benefits, when the miners qualified for lifetime benefits from the Trustees because of their former employment

(we expand on this point infra) and the employers' departure from the industry contributed to the problem confronting the Trustees.

B & T and Unity urge that they are not responsible for most of the burden on the Funds. However, B & T was a large employer, whose departure from the industry added over a thousand beneficiaries to the Funds' "orphans," and its individual impact was therefore significant. In addition, Unity may be held partially responsible because, though its individual contribution to the problem was small, the aggregate effects of its actions and parallel actions by other companies contributed to the problem. Congress may reasonably include all of the parties whose acts, taken together, gave rise to a problem, even if the individual contributions of each are small. *Cf. Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S. Ct. 82, 87 L. Ed. 122 (1942) (applying the same reasoning to Congress's Commerce Clause power).

3. The Background of Government Regulation

We consider the background of government regulation significant as well. The coal industry has been heavily regulated for decades, including the government-imposed 1948 Krug-Lewis Agreement, which created the basic health benefits structure. The companies had no reasonable expectation that the government would not expand its regulation of health benefits in the coal industry, given the history of labor unrest and government intervention. *See* 136 Cong. Rec. S17814 (daily ed. Oct. 27, 1990) (statement of Sen. Glenn) (containing Congressional Research Service report on the extensive history of federal intervention into the health status and benefits of coal workers and into labor relations in the coal industry more generally).[5]

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[5] Indeed, amicus LTV was the specific target of at least one bill to mandate that it continue to fund health benefits for its retired miners as early as

The coal operators were also aware of the growing number of government requirements that vested benefits be paid, whether or not an employer was contractually obligated to pay for them, as the industry's response to ERISA indicated. The situation is thus analogous to those in *Connolly* and *Concrete Pipe*, in which the Court found that, in light of the history of federal pension regulation, employers could not reasonably assume after 1978 that their obligations to pension funds would never exceed the specific terms of their contracts, *see Connolly*, 475 U.S. at 227, nor could they reasonably assume that Congress would not increase the statutory cap on ERISA withdrawal liability, *see Concrete Pipe*, 508 U.S. at 646. The parties were well aware that pension plans could subject employers to retroactive liability in cases of underfunding, and could have foreseen that Congress might act similarly with respect to health benefits.

4. The Contractual Language

Turning to the expectations created by the contracts, the threshold question is whether we need to distinguish between explicit and implicit promises of lifetime benefits. Although the plaintiffs concentrate on explicit promises, an issue on which their position is strong, we think that explicit promises are not necessary in order to justify congressional action. The question is what reasonable expectations the coal companies' actions created. While an expectation cannot be reasonable without some foundation in the real world, an explicit representation that the companies would provide lifetime benefits is not required, since reasonable expectations may arise from a consistent course of conduct as well.

1986. *See* 132 Cong. Rec. S9879 (daily ed. July 30, 1986) (bill discussed by Sens. Byrd, Dole, Durenberger, Glenn, Heinz, & Specter); *id.* at E2714 (daily ed. Aug. 1, 1986) (statement of Rep. Rahall).

Plaintiffs and amici argue that the coal companies never made any promises, implicit or explicit, or raised any expectations of lifetime benefits. They first point to the text of the NBCWAs, which did not themselves require the coal companies to provide lifetime benefits under all circumstances. They dissect the various contractual provisions and characterize their import as follows: (1) the health card that miners received for benefits "for life" did not guarantee any specific benefits; (2) the "evergreen" clauses only referred to an employer commitment to continue funding benefits, but did not promise anything about the scope of those benefits; (3) the "evergreen" clauses only applied to operators who stayed in the coal business; (4) the contracts allowed benefits to be suspended or reduced; and (5) the guarantee of benefits lasted only through the term of the agreement. Additionally, an UMWA negotiatior testified in the course of other litigation that everything was up for renegotiation at the end of a contract and that the parties could have agreed to eliminate benefits entirely. *See District 17, UMWA v. Allied Corp.*, 735 F.2d 121, 126 (4th Cir. 1984), *vacated*, 765 F.2d 412 (4th Cir. 1985).

It is true that the funding contribution requirements were limited to the life of the agreement, "ending when this Agreement is terminated," in 1978 and subsequent NBCWAs. Yet all of these arguments have the same fundamental weakness, which is that they go to the contract and not to the reasonable expectations that might have been created by the contract. The UMWA negotiator's testimony is a particularly strong example of this: the parties could have agreed to eliminate benefits in any given negotiation, but there was no realistic chance that they would. The defendants do not dispute that the contracts did not provide for the payments mandated by the Coal Act. If the contracts had so provided, the Coal Act would have been unnecessary. The plaintiffs' dissection of the contracts is a brilliant exercise, and were we deciding a case on labor and contract law principles the outcome would be clear in their

favor.[6] But this is not an action brought for contractual violations. We focus our attention instead on what conclusions Congress might rationally draw about the parties' relations and expectations, and what it might fairly do to close the gap between the contractual obligations of the coal companies and the Funds' actual liabilities.

The NBCWAs did not in themselves guarantee that the coal companies would pay for lifetime benefits for retirees and their dependents. There thus is a tenable argument that the NBCWAs did not obligate the Trustees of the Funds to pay lifetime benefits, because the evolution of the benefit structure did not indisputably culminate in a lifetime guarantee. Indeed, the former coal companies have a number of strong arguments, and reasonable people could well disagree about Congress's choice to impose liability on them. Nonetheless, we conclude that Congress could reasonably have reached the conclusions it did about the expectation of lifetime benefits and about the coal companies' responsibility for the situation in which the Funds found themselves after the changes of the 1970s and 1980s.

a. Contractual Clarity

The plaintiffs submit that *Eastern* turned on the fact that the relevant NBCWA provisions clearly did not provide for lifetime benefits. We believe that this is a subtle but significant "spin" on the plurality's view, which found that the obligations imposed on Eastern were unrelated to its contractual obligations. The plurality noted that, during Eastern's participation in the industry, retirement and health benefits were far less extensive than they later became; the benefits were also

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[6] However, not all of these arguments are persuasive even as a matter of contractual interpretation. As we discuss below, after 1978 health benefits were specified in the contract, and that the evergreen clause and the health card sections of the agreement did not describe the other sections of the contract does not mean that those specifications were without effect.

not vested. Furthermore, benefits were subject to alteration or termination with far fewer constraints than those later imposed by the shift of control from the Trustees to the BCOA and the UMWA. In fact, entire categories of beneficiaries provided for under the Coal Act were not part of the older NBCWAs, and "Eastern could not have contemplated liability for the provision of lifetime benefits to the widows of deceased miners." *Eastern*, 118 S. Ct. at 2150 (plurality). All these facts meant that there was no rational relationship between Eastern's past acts and its Coal Act-imposed obligations.

If *Connolly* retains any force, as we think it does, the clarity of contractual provisions is far from dispositive. *Connolly* itself involved a contract whose limits were at least as clear as those in the contracts at issue here. Even crystalline contractual provisions, accompanied by well established practice and understandings, can create reasonable expectations extending beyond the four corners of a contract. Though courts may be unable to enforce those expectations, Congress is not so constrained. We believe that our position is bolstered by a careful reading of the *Eastern* plurality opinion, which did not suggest that an implicit promise (that is, one not clearly found in the contract) would be insufficient to sustain the Coal Act if that promise had a reasonable basis in actual practice or in the penumbra created by contractual promises. Instead, the plurality found no evidence of any implied lifetime promise. *See Eastern*, 118 S. Ct. at 2152 (plurality). Justice Kennedy, likewise, focused not on the clarity of the contract but on the lack of a connection between pre-1978 coal operators and retired miners' reasonable expectations and instability in the benefit structure. *See id.* at 2159 (Kennedy, J., concurring).

b. Lifetime Benefits

The plaintiffs argue that the NBCWAs never promised "lifetime benefits," and that the miners' only reasonable expectation based on the NBCWAs would have been that any operators who remained in the coal industry and continued to

sign agreements would pay for their benefits indefinitely. From that perspective, the Coal Act retroactively transformed a series of three or four-year commitments into an open-ended, decades-long obligation.

The plaintiffs' reading of the agreements is too crabbed. The 1974 NBCWA has thirteen separate references to health service cards "for life" or "until death." Plaintiffs submit that this simply referred to a health card that no one would ever take away but that could be reduced to a worthless piece of paper at any time. However, not only did the 1978 NBCWA have sixteen separate references to coverage "for life" or "until death," it also refers to an "entitle[ment] to receive health benefits until death" in at least one section. 1978 NBCWA, Art. XX, at 116. The plaintiffs submit that this reference was inextricably linked to the references to health service cards. We agree, but think that the slippage between lifetime health cards and lifetime health benefits counsels against the plaintiffs' position: The lifetime health card may just as easily be seen as a shorthand reference to lifetime benefits, which may be why the parties did not correct (in this carefully negotiated contract) the reference to "benefits until death."[7] This language, synonymous with the health card language, appears to reflect the bargaining parties' understanding that the lifetime provision of health benefits was an absolute requirement for any contract. *See Nobel*, 720 F. Supp. at 1175 (finding that the coal operators understood that lifetime benefit language was crucial to the ratification of any contract and that the BCOA therefore abandoned its attempt to remove such language).

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[7] The plaintiffs also note that the "benefits until death" language appears in a provision discussing restrictions on benefits whenever the beneficiary exceeded the earnings limit. However, the point of the provision was that the beneficiaries were entitled to benefits during any period that they did not exceed the earnings limits until death.

We do not rest our decision on the reference to "benefits until death"; rather, it is a *datum* supporting the overall conclusion that the health card was expected to guarantee benefits for life. The 1981 and 1984 NBCWAs continue in the same vein with sixteen references to coverage "for life" or "until death." While we appreciate the force of the plaintiffs' arguments to the contrary, we are persuaded that it would have been reasonable for miners to expect that the "lifetime" health card actually meant that lifetime benefits would be provided to anyone in possession of a health card.

Plaintiffs nonetheless argue that the appearance of the phrases "for life" and "until death" in the 1974 and subsequent agreements does not imply any commitment to provide lifetime benefits. According to them, we should understand the lifetime health card as doing no more than serving the valuable administrative function of ensuring portability. At most, the plaintiffs argue, the possession of a health card merely entitles a retiree to whatever benefits, if any, were available under the NBCWA then in effect. The plaintiffs interpret "lifetime" to mean simply that, if an NBCWA were in place, miners could not lose their benefits after a fixed period of time (a problem that had arisen in the past when the Trustees cut off retired miners after five years or some other fixed period).

This is a strained reading of the terms "for life" and "until death," which refer to persons (the miners and their dependents) and not to the continued existence of an NBCWA. Furthermore, this argument does not aid the plaintiffs much, as NBCWAs were in effect through the passage of the Coal Act and even to this day, although the plaintiffs are no longer signatories to them. There is no real-world difference between a lifetime guarantee and a guarantee that lasts while NBCWAs continue to exist, especially as the guarantee did not depend on any particular employer's continued adherence to the NBCWAs. The fact that NBCWAs continue is evidence that it was reasonable to expect them to continue, and thus that it

was reasonable to expect that a "lifetime" guarantee, even one that could theoretically expire if the entire NBCWA system collapsed, was in reality a lifetime guarantee. *Cf. D'Amico v. City of New York*, 132 F.3d 145, 151 (2d Cir. 1998) (reasoning that the occurrence of an event is evidence that a decision-maker was justified in predicting that event).

The plaintiffs further point out that the 1950 and 1974 Plans contained language stating that, if assets became insufficient, benefits could be suspended or reduced. The Plans were incorporated into the 1974, 1978, 1981, and 1984 NBCWAs by reference. Moreover, the plaintiffs note that the Plans were subject to modification or amendment, and there were provisions that would take effect "[i]n the event of the termination of the 1950 Plan." The plaintiffs also contend that when miners received health cards, they were specifically told that their benefits were subject to amendment or termination "at any time." 1958 Annual Report. Of course, later NBCWAs were designed to limit the Trustees' authority to do so, by defining the benefits to be provided, by establishing lifetime eligibility for a health card, and by eliminating the Trustees' ability to alter benefits without the consent of the union and the BCOA after 1971.

But the NBCWAs always clearly stated that they were in effect for limited terms. The individual employer plans for health benefits that were established under the 1978 NBCWA, like the 1950 and 1974 Plans, had the stated purpose of providing benefits "during the term of this Agreement." The plaintiffs conflate the issue of whether the coal companies' contribution requirements were "lifetime," which they clearly were not under the contract, with the issue of whether the contracts provided for lifetime health benefits. The lifetime health card was intended to put an end to the Trustees' pre-1974 practices of cutting beneficiaries off if their former employers were delinquent in paying into the Funds or if they had received benefits for a set period of time. Thus, the

Trustees could reasonably be seen as required to pay lifetime benefits to all retirees and their dependents in possession of a health card; the contractual terms had the effect of binding the Trustees to a lifetime commitment, although they did not of themselves bind the coal companies to the same commitment.[8]

Despite the plaintiffs' contention that the numerous cases holding that "for life" means lifetime benefits were wrongly decided, we are unpersuaded that those cases lacked support for their conclusion. *See, e.g., In re Chateaugay Corp.*, 945 F.2d 1205, 1210 (2d Cir. 1991); *District 29, UMWA v. UMWA 1974 Benefit Plan & Trust*, 826 F.2d 280, 282-83 (4th Cir. 1987); *Grubbs v. UMWA*, 723 F. Supp. 123, 128 (W.D. Ark. 1989); *Nobel*, 720 F. Supp. at 1178.[9] The plaintiffs assert that, at all events, *Eastern* throws these cases into doubt. We

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[8] The plaintiffs also argue that the Trustees understood that benefits were limited to the term of the agreement. When the 1974 NBCWA expired on December 6, 1977, the Trustees stopped providing health benefits to retired miners, and the subsequently negotiated 1978 NBCWA prohibited retroactive funding of such benefits. This is significant, but, given that the benefit funds were fundamentally reconfigured at the same time to focus on individual employers, it would have been difficult to deal with those few months retroactively during the transition to the new regime. The short gap necessitated by the delay in negotiating a new contract during bitter labor strife does not disprove the general promise of lifetime benefits in the future.

[9] *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 102 S. Ct. 1226, 71 L. Ed.2d 419 (1982), also refers to "lifetime" benefits. *See id.* at 565-66. The plaintiffs argue that NBCWAs were in place at all times relevant to *Robinson*, and so that case provides no basis for suggesting that benefits would be available in the absence of an NBCWA. However, this argument actually favors the defendants. We reiterate that we are not construing the contract but deciding what reasonable expectations it might generate. In that analysis, the fact that NBCWAs persisted for decades, although it was always possible that they would expire, favors the defendants, since the long history of NBCWA renegotiation makes the expectation that benefits would continue more reasonable.

disagree, because the Supreme Court said nothing about the Trustees' obligations, nor did the Court take up the post-1978 contracts at all.

Furthermore, contrary to the submission of the plaintiffs, these lower court cases did analyze the provisions of the contract, recognizing that the Trustees were obligated to provide benefits only "during the term of this agreement," just as the companies were only required to contribute during the term of the contract. Rather than ignoring this temporal language, the decisions found that other language in the contract, combined with testimony from the negotiators, obligated the Trustees to provide lifetime benefits. *See District 29, UMWA*, 826 F.2d at 282. That the contracts may contain contradictory language does not, as plaintiffs and amici contend, make any construction requiring lifetime benefits unreasonable; instead, there was evidence pointing in both directions. Just as it was not unreasonable for courts to conclude that the contracts provided lifetime benefits, it was not unreasonable for Congress to rely on similar evidence, even though Congress could also reasonably have disagreed. In fact, we could even consider such judicial decisions, the earliest of which were referenced in the Coal Commission Report, as data justifying Congress's conclusion that lifetime benefits were promised, since Congress may reasonably look to the findings of a coordinate branch. *See* Coal Comm'n Report at 3, 28, 47, 55-56.

The question, then, is not whether the health benefits are truly "for life" but whether the former coal companies can justly be associated with the promises of lifetime benefits that by contract run only against the Trustees. The argument is that it was acceptable, by virtue of the contractual limitations, for companies to walk away and leave the Trustees and the companies remaining in the coal industry to pay the tab. And it is this underlying claim that we think Congress could

rationally reject. In this regard, we reiterate that our obligation is to determine what Congress could reasonably have found.

Congress certainly possessed credible evidence that miners expected those benefits. The Coal Commission, for example, reported to Congress in 1990 that

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored.

Id. at vii. The Commission based its conclusions on substantial evidence, including testimony from many industry participants on both sides of the issue. Even a dissenting member of the Commission, who was the president of a coal company, acknowledged that the post-1978 agreements created a promise of lifetime benefits. *See id.* at 81 (statement of Commissioner Holsten).[10] Although the Coal Act's statutory scheme was proposed nine and two years, respectively, after Unity and B &

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[10] The conclusions of the Coal Commission Report are not rendered suspect by *Eastern*; although the plurality and Justice Kennedy concluded that Congress could not reasonably decide that pre-1978 signatories were responsible for creating expectations of lifetime benefits, it is notable that the Coal Commission never proposed the "super reachback" provision challenged in Eastern. *See Eastern*, 118 S. Ct. at 2141 (plurality); Coal Comm'n Report at 61, 63, Supp.App. at 420, 422. The Commission's proposal provided for liability under what became § 9706(a)(1) and § 9706(a)(2), which only apply to post-1978 signatories, while § 9706(a)(3) was added late in the legislative process. See J. Atwood Ives, *Federal Document Clearing House Congressional Testimony, House Ways & Means Oversight, Coal Workers Retirement Benefits*, June 22, 1995. The Coal Commission's findings remain persuasive evidence from which Congress could conclude that signatory operators remaining in the coal industry after 1978 created a reasonable expectation of lifetime benefits among miners and their families. *See also* 138 Cong. Rec. S5081, S5082 (daily ed. Apr. 8, 1992) (statement of Sen. Boren) (referring to the expectations created by the 1978 agreement); *id.* (statement of Sen. Dole) (same).

T ceased to be bound by an NBCWA, and that is certainly a significant period of time, we cannot say that it is beyond the pale in light of the lifetime nature of the commitment at issue.

c. Other Contractual Provisions

The negotiations of the 1970s took place in a changing legal context, as the Coal Commission's report to Congress recognized. ERISA made clear that employers who promised pension benefits were going to have to give them, and when the parties negotiated the 1974 and later agreements, that idea was certainly in mind. Moreover, starting in 1974, the new agreements removed the Trustees' discretion to set benefit levels and eligibility standards. *See* Coal Comm'n Report at 24.

By 1977, anxiety had intensified, and the miners struck for nearly four months over, among other things, health benefit issues. The federal government intervened to settle the strike. The 1978 agreement introduced the "evergreen" and "guarantee" clauses and rearranged the benefit funds in major ways. *See id.* at 26. The evergreen clause only applied to companies that stayed in the coal mining industry. As such, it has no bearing on these plaintiffs except insofar as it expresses an intent by the negotiators to keep health benefits funded, as the miners expected them to be, in the context of growing burdens on NBCWA coal operators.

Under the guarantee clause, signatory employers committed to make the contributions necessary to maintain the contractually specified benefits throughout the term of the agreement, even if that required an increase in the contribution rates specified at the outset of the contract term. This was essentially a shift "from a defined contribution obligation, under which employers were responsible only for a predetermined amount of royalties, to a form of defined benefit obligation, under which employers were to fund specific benefits." *Eastern*, 118 S. Ct. at 2140 (plurality). The evergreen clause

represented a similar effort by the bargaining parties to protect the funding base for ongoing health coverage.

The coal companies contend that everyone recognized that, when the contract ended, the benefits would end. The 1978 guarantee clause guaranteed benefits and provided for increased contribution if necessary only "during the term of this Agreement." The defendants respond that the "end of contract/end of benefits" equation is not the end of the story. They argue that it was reasonable for the miners to expect that the contract would be replaced by another contract, and then another, and then another, with at least comparable benefits, even if the industry and its participants changed. After all, that is what had taken place for the past fifty years: the slow but steady expansion of benefits. The NBCWAs, they argue, were negotiated in a context where the miners believed that, in return for wage and employment concessions, they would be able to guarantee their futures. In fact, as noted above, the NBCWAs have endured for decades after the changes of the 1970s, evidencing the reasonableness of a belief that the agreements would continue.

We do not ignore the plaintiffs' history in the industry, which extended for many decades and ended over thirty years after Eastern Enterprises left the coal industry. Unity mined coal for 58 years and B & T for 80. Coal companies such as Unity and B & T received benefits from the steady expansion of health and retirement benefits, including wage concessions and union agreement to mechanization, during that period. Their long-term participation made it particularly understandable that miners would expect that the companies' adherence to promises of lifetime benefits in the NBCWAs would be honored.

5. Conclusion

Our review of the evidence suggests that there are several plausible interpretations of the events leading up to the Coal

Act. It could well be the case that former coal companies are not the most responsible parties in the deterioration of the health of the benefit funds, but Congress could also rationally find that they bore significant responsibility in setting up a structure that invited operators to abandon mining and shunt the burden of caring for retirees on other parties. Similarly, it could be that the contracts did not create a lifetime benefit obligation on the part of the Trustees, yet Congress had substantial evidence to the contrary. We will defer to Congress's judgments on the nature of the problem before it, including judgments about causation and reasonable expectations. The next question, therefore, is whether Congress's reasonable evaluations of the problem justified the corrective measures it mandated in the Coal Act.

C. Is the Coal Act a Rational Response to the Problem Congress Identified?

Given that evidence exists to support Congress's interpretation of the history of the coal industry and the NBCWAs, we must ask whether that evidence is enough to justify a retroactive law of this scope. For the following reasons, we conclude that the Coal Act's retroactivity does not render it irrational in violation of due process.

1. The Length of the Retroactivity

The heart of retroactivity analysis is an evaluation of the extent of the burden imposed by a retroactive law in relation to the burdened parties' prior acts. We note as an initial matter that the length of the retroactivity alone is not dispositive in this case. The retroactivity is significantly less extensive than that in *Eastern*. We evaluate retroactivity not from the time the plaintiffs first signed an industry agreement, nor from the time the miners' right to benefits accrued, but rather from the end of

the plaintiffs' contractual obligations to pay for such benefits.[11] For Unity, that period is eleven years, and for B & T four years, because B & T was bound by the 1984 NBCWA until 1988. This is substantially less time than the gap between Eastern's exit from the coal business and the enactment of the Coal Act, although, at least for Unity, it is still quite long.[12] We conclude that this degree of retroactivity is not so extensive as to violate Justice Kennedy's standard, although Unity offers a close case.[13]

Instead of relying solely on the length of the retroactivity, we assess the relationship of the retroactively imposed liability to

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[11] We choose the expiration of NBCWA obligations because, although covered retirees may have stopped working for the plaintiffs before those dates, the contracts obligated the plaintiffs to continue paying for benefits until those contracts expired and, after 1978's evergreen clause, until the plaintiffs left the industry. This was not true of the relevant contracts in Eastern. Thus, the retroactivity extends not from the date of the miners' retirement but from the period during which the plaintiffs were free of any contractual obligation to pay for benefits.

[12] The retroactivity approved in *Usery* was actually much greater in some circumstances. The black lung law was enacted in 1969 and began imposing liability on employers in 1973. Yet benefits were given to miners who left mine work as early as 1923. *See Usery*, 428 U.S. at 40 n. 4 (Powell, J., concurring in part). In addition, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657, has an unlimited retrospective temporal reach, which has yet to be invalidated by any court to consider the issue. *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160, 173-74 (4th Cir. 1988).

[13] We focus on Justice Kennedy's explication of the relevant due process principles because the plurality did not reach Eastern's due process claim. *See Rappa v. New Castle County*, 18 F.3d 1043, 1058-61 (3d Cir. 1994) (where "no single approach can be said to have the support of a majority of the Court," then "no particular standard constitutes the law of the land" and lower courts are bound by the result as applied to "substantially identical" cases).

the governmental interests asserted in its defense. *See Eastern*, 118 S. Ct. at 2159 (Kennedy, J., concurring) (retroactive remedies must bear "a legitimate relation to the interest which the Government asserts supports the statute"); *id.* at 2163 (Breyer, J., dissenting) ("[A] law that is fundamentally unfair because of its retroactivity is a law which is basically arbitrary.").

The plaintiffs argue that retroactivity has only been upheld in three situations: (1) where the employer continues to operate in the regulated industry after the enactment of a retroactive law; (2) when employers would otherwise be able to take advantage of the delays inherent in the legislative process; and (3) where a worker's injury or illness is related to his or her work. This categorization is unsatisfactory. The first category lacks adequate analytical foundation. If a law is truly retroactive, applying to conduct completed before the law was enacted, it would seem only marginally relevant that an employer kept doing what it had been doing before, for the liability would be based on past acts, not post-enactment acts; the continuation in the old business would not seem to justify the retroactivity. If it would be fundamentally unfair to make a business pay for its long-past acts, it would seem equally unfair to put that business to the choice of leaving its established business or paying for its long-past acts.

We posit a different standard: Where Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively. The ERISA and MPPAA cases establish that Congress may retroactively bar employers from giving their employees vested pensions in multiemployer plans and then leaving those plans to collapse. Those cases did not examine whether the employers continued to operate the same kind of business as they did when their former employees' pensions became vested. Our categorization also recognizes that workers can be harmed not just by late-appearing physical consequences of their jobs but

also by an employer's failure to live up to a long-term promise that formed part of the worker's reasonable expectations on the job. Both a promise of benefits and a job-related illness have a nexus to the worker's employment, as we discussed *supra* Subsection III.B.1.

2. The Size of the Burden

The amici (other former coal operators) call our attention to the size of the burden imposed, arguing that, because the Eastern plurality found that paying lifetime benefits imposed a "considerable" burden on Eastern Enterprises, by definition the same is true for all other entities required to pay benefits under the Coal Act, since the amount of the payment per beneficiary is the same under every part of the law. In *Eastern*, however, the total amount at issue was between $50 and $100 million, whereas here the total cost is well under $1 million to date for Unity and around $2.5 million per year for B & T, an amount that will continue to decrease as beneficiaries die. Therefore, the plaintiffs are not in the same situation as Eastern Enterprises.

We will not find a due process violation if the regulation is proportional to the harm legitimately addressed by the legislature. Yet the proportionality requirement will only be applied when the harm inflicted by the government is substantial enough to raise an issue as to whether a violation of due process has occurred. As the total absolute burden imposed by a statute increases, it becomes simpler for a court to determine that the legislature has exceeded the bounds of rationality, whereas a smaller burden means that Congress's error, if any, is less likely to justify the extreme sanction of invalidation on due process grounds.

If, for example, Congress imposed a one-dollar burden on each member of some industry, and we concluded that five cents was the only amount that could be linked to Congress's asserted justification for the burden, we would still be

disinclined to strike down the statute; the fact that the burden imposed was twenty times the actual cost would not be determinative. As the actual amount of the burden decreases, errors in its calculation increase in relative magnitude, but the leeway given to Congress in enacting social and economic legislation mandates that we look to absolute rather than relative magnitudes, so that our review is limited to those laws that work the most severe disruptions of settled expectations.

For similar reasons, we doubt that a former coal company would have a credible claim of "considerable" burden if it were only responsible for a small number of beneficiaries under the Act, even if the company was in such dire financial straits that the liability would push it over the economic edge. It is the aggregate cost — the total size of the burden imposed — and not the per-beneficiary cost that is significant under our due process jurisprudence. While the burden in this case is certainly substantial, and thus we will carefully scrutinize the Coal Act, the burden is not dispositive in itself. We acknowledge that the Coal Act will put these particular plaintiffs out of business, but that fact is again a matter of relative burden, not absolute burden and, because it does not determine the due process issue, we reserve our discussion of this consideration for our analysis of the plaintiffs' takings challenge *infra* Part IV.

3. Proportionality and Congress's Ability To Go Beyond Private Contracts

As we stated above, proportionality is the proper test of economic impact. The burden imposed on regulated parties may be heavy, but the *Connolly* Court found that a large burden is not unconstitutional if the liability actually imposed is not out of proportion to the claimant's prior experience with the object of the legislation. *See Connolly*, 475 U.S. at 226; *see also Eastern*, 118 S. Ct. at 2150-51 (plurality) (discussing the justifications for imposing liability as part of the analysis of the economic impact factor). Prior experience can consist of conduct that creates reasonable expectations about the object

of the legislation or conduct that creates the problems that impelled the legislature to act. Given that the situation that impelled Congress to enact the Coal Act contained elements of both, we believe that the necessary proportionality exists.

The Coal Act bridges a gap between the contractual promises of coal companies and the full extent of the funding required to provide retired miners with lifetime health benefits. The Trustees and the government argue that the companies' extracontractual acts, signalled by contractual language but going beyond that language, justify Congress's decision to bridge that gap. The extracontractual acts fall into two general categories: the instability of the pre-Coal Act benefit funding structure to which the former coal companies contributed, and the expectation of lifetime benefits created by contractual language combined with the parties' consistent practices. As we have explained, we consider these reasons sufficient justification for the liability imposed by the Coal Act.

As the defendants put it, the NBCWAs made a long-term commitment to provide health-care benefits but only a short-term contractual commitment for funding.[14] They argue persuasively that this arrangement would be silly, even suicidal, for the miners and the funds were it not made in the context of a belief that the industry would continue on pretty much as it had been for the past few decades. Given this, we think that Congress could reasonably conclude that it would be fair to hold the coal companies to the implicit part of their promise, because when they left the industry the explicit part lost its meaning. *See ABC, Inc.*, 156 F.3d at 1255-57.

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[14] This disposes of plaintiffs' contention that the guarantee clause of 1978 would have been superfluous if there were already a lifetime guarantee of benefits. The guarantee clause was an attempt to insure that the Trustees could live up to their obligations, an attempt that ultimately failed.

The *Eastern* plurality did not reject the *Connolly* principle that government may do more than require private parties to live up to their contracts:

> [C]ontracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
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> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking. . . . [H]ere, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose.

Connolly, 475 U.S. at 223-24 (citation omitted); *see also Eastern*, 118 S. Ct. at 2148 (plurality).

In *Connolly*, a contract limited the employers' obligations even if contributions proved insufficient to provide the promised benefits. The challenged legislation converted that defined contribution obligation to a broader defined benefit obligation. Congress enacted the law so that retirees could receive the vested benefits they had been promised and that they legitimately expected. The Court found a reasonable relation between the employers' acts and ERISA-imposed liability, even though the employers could not have foreseen a defined benefit obligation from the face of the contract. Here, the signatory operators created a benefit fund with a legal obligation to pay out more than the operators were required to

pay in, just as in *Connolly*, and the Coal Act was Congress's attempt to close that funding gap.

The plaintiffs distinguish *Connolly* by arguing that the problem in that case was that companies had made broad promises that the pension funds to which they contributed would pay pensions, but only obligated themselves contractually to pay a much smaller amount to those pension funds. The plaintiffs claim that, in this case, the promises that the Funds would pay benefits were narrow, because those benefits could be reduced or eliminated at any time, and the contractual obligations were broad during the period of their existence. As we have discussed above, however, Congress decided that even though the coal companies' contractual obligations were not broad enough to sustain the Funds, their promises that the Funds would pay benefits — made as part of the BCOA union negotiations — were broad. This is a reasonable reading of the NBCWAs, particularly given that the 1974 NBCWA removed the Trustees' discretion to change benefit levels without the bargaining parties' permission and that the 1978 NBCWA began the practice of enumerating the exact health benefits to be provided. *Cf. Nobel*, 720 F. Supp. at 1180 (holding that benefits could not be reduced or discontinued by the Trustees despite the financial burden on the Trust).

The Coal Act extended the operators' contractual obligations to include responsibility for the expectations generated and invited by the contracts. Essentially, the Act is Congress's attempt to do equity. We agree with the court in *ABC, Inc.*, which wrote:

> The constitutionally significant feature about these later agreements is that they made it reasonable for employers to expect a similar state-imposed duty, and thus rendered such a duty, when eventually imposed, not unfairly retroactive. That appellants could have successfully defended a breach of contract suit seeking lifetime benefits under the 1974 agreement is of no consequence.

ABC, Inc., 156 F.3d at 1258.

The plaintiffs argue that it is implausible that operators in an industry with "very high turnover of employers," *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992), would have agreed to a perpetual funding obligation enforceable even against operators who left the coal industry entirely, whether for economic reasons (high labor costs, competition from other fuels, and the like) as B & T did or because they were out of coal. We agree that it is unlikely that the coal companies intended to create this exact funding structure, although modern employment relations often include post-retirement promises that may prove burdensome when conditions change for an employer. The crucial question, however, is whether the companies' actions, through the BCOA through which negotiations with the unions were conducted, created reasonable expectations about benefits and established a funding structure vulnerable to "dumping" retirees when companies left the industry. If so, Congress is not precluded from acting to redress the harms caused by this situation.

4. Conclusion

We have evaluated the Coal Act against our traditional standards of proportionality and distaste for retroactivity, taking into account our deference to Congress on the evils to be addressed by the law. Ultimately, although the issue is close, we conclude that the Coal Act is targeted to address the problem of insufficient resources in the benefit funds and that it puts the burden on those who, in Congress's reasonable judgment, should bear it. The law's retroactivity is troubling, yet given the nature of the commitments at issue and the relationship of Coal Act liabilities to past acts in the industry, we cannot say that the Act violates due process.

IV. CATEGORICAL TAKINGS

Unity and B & T also maintain that the Coal Act is an unconstitutional taking as applied to them. They ask us to

apply a categorical takings approach because, they claim, their businesses will be entirely destroyed if they have to pay benefits under the Act. In *Eastern*, the argument that the Coal Act would drive the plaintiff out of business entirely was not presented to the Court, and so the plaintiffs argue that they retain a viable takings claim.

Five Justices, however, rejected the idea that a law that imposed only a financial burden without identifying a particular property right could ever consitute a taking. The fact that in a particular case a financial burden might consume all of a particular entity's assets would not seem to change Justice Kennedy's analysis: "The Coal Act neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms." *Eastern*, 118 S. Ct. at 2156 (Kennedy, J., concurring). Similarly, the dissent would require the governmental identification of "a specific interest in physical or intellectual property" in order to find a compensable taking. *Id.* at 2161 (Breyer, J., dissenting). The reasoning of these five Justices was that any governmental regulation that costs a business money could become a taking if the plurality's standards prevailed, and that this would be an unacceptable result. *See id.* at 2155 (Kennedy, J., concurring); *id.* at 2162 (Breyer, J., dissenting). This reasoning is unaffected by the characterization of the burden as a "total" taking because it consumes all of a particular company's resources. Moreover, even the plurality gave no indication that it would extend the categorical takings approach outside the context of regulations of real property.

Because the *Eastern* Court was not confronted with this situation, however, we must set forth our reasons for rejecting it in greater detail. To date, the categorical approach has only been used in real property cases such as *Lucas v. South Carolina*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed.2d 798 (1992). In those cases, the concept of "total destruction" of value refers not to the owner's total assets but to some

identifiable property interest. Indeed, even a multi-billionaire would be eligible for an award under a categorical takings approach if some small, distinct parcel of his holdings were condemned or rendered worthless through regulation. Therefore, the "total destruction" language of cases concerning real property should not be mechanically applied to the situation at bar. *See Branch v. United States*, 69 F.3d 1571, 1576-77 (Fed. Cir. 1995) ("Because of 'the State's traditionally high degree of control of commercial dealings,' the principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability." (*quoting Lucas*, 505 U.S. at 1027)).

The Supreme Court has repeatedly rejected the argument that a tax — even a tax on a small set of businesses — may violate due process or constitute a taking simply because it may force some of the regulated entities out of business:

> The claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the "reasonableness" of a tax that otherwise is within the power of Congress or of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable.
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> . . . . The premise that a tax is invalid if so excessive as to bring about the destruction of a particular business, the Court said, had been "uniformly rejected as furnishing no juridical ground for striking down a taxing act." [*Magano Co. v. Hamilton*, 292 U.S. 40,] 47, 54 S. Ct. 599, 78 L. Ed. 1109 [(1934)]. *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482 (1869); *McCray v. United States*, 195 U.S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904); and *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 41 S. Ct. 219, 65 L. Ed. 489 (1921), are to the same effect.

> In *Alaska Fish*, a tax on the manufacture of certain fish products was sustained, the Court saying, *id.*, at 48-49, 41 S. Ct., at 220: "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. . . ." *See also International Harvester Co. v. Wisconsin Dept. of Taxation*, 322 U.S. 435, 444, 64 S. Ct. 1060, 1065, 88 L. Ed. 1373 (1944); *Child Labor Tax Case*, 259 U.S. 20, 30, 42 S. Ct. 449, 66 L. Ed. 817 (1922); *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 24, 36 S. Ct. 236, 244, 60 L. Ed. 493 (1916); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 168-169, 31 S. Ct. 342, 356, 55 L. Ed. 389 (1911).

City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 373-74, 94 S. Ct. 2291, 41 L. Ed.2d 132 (1974). We note in this regard that we, along with other Courts of Appeals, have held that Coal Act obligations are taxes. *See Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688, 695 (3d Cir. 1996) (finding that the Act is "essentially a tax to continue a benefits program").

The plaintiffs respond that these taxation cases all concerned prospective, not retrospective, liability, but that argument conflates two separate issues. The size of the liability does not depend on whether or not the obligation is retrospective. If the argument is that the complete consumption of a company's assets is a categorical taking, retroactivity would be irrelevant; if such a law would only be a categorical taking when it was retroactive, then we are not really discussing a "categorical" taking. We think that retroactivity, while crucial to our due process analysis, is not properly considered as a part of the categorical takings analysis.

The Court of Appeals for the Federal Circuit has also rejected the plaintiffs' argument, with reasoning we find persuasive:

> The constitutionality of the assessment should not depend on the happenstance of the financial condition of the assessed bank at the time of the assessment. We are unaware of any principle of takings law under which an imposition of liability is deemed a per se taking as to any party that cannot pay it. It would be perverse to hold that a statute resulting in a $99 million liability would be constitutional as applied to any [entity] having a net worth of more than $100 million but unconstitutional per se as to any member having a net worth of less than $100 million. The assessment in both cases is based on the same theory of liability and should meet the same constitutional fate.

Branch v. United States, 69 F.3d at 1577.[15] *Branch* recognizes that general regulatory laws, unlike the particu-larized applications of zoning regulations that are the typical targets of takings challenges, usually have the kind of general applicability

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[15] The plaintiffs dispute the *Branch* court's reasoning by citing to *Lucas*, in which the Court wrote:

> It is true that at least in some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.

Lucas, 505 U.S. at 1019 n. 8. However, *Lucas* is inapposite. In *Lucas*, there was a strip of affected beachfront land; that land was reduced to zero value by regulation; that was a taking. The Court did not inquire into whether the landowners had enough other resources to survive the reduction in value, because that was not relevant to the test. All that was necessary was to look at the value of the affected land. Under the plaintiffs' interpretation, the Court should have examined Mr. Lucas's financial condition before and after the regulation at issue, and there would not have been a categorical taking if Mr. Lucas remained in the black. This suggests the difficulties with a takings analysis that is unanchored to a specific property interest.

that mutes the concerns behind takings jurisprudence. The broader the reach of a law, the less likely it is that a powerless segment of society is being unfairly singled out to bear a burden that society as a whole should bear.[16]

As the concurrence and the dissent in *Eastern* suggest, considerable practical problems would arise were we to find plaintiffs' categorical takings claim cognizable. For example, we would have to decide at what point we could justify granting relief on these grounds. Unity will go out of business as soon as it is ordered to pay. B & T, by contrast, will apparently go under in two years, when its liabilities under the Act consume the last of its reserves. Should we wait until B & T is in the same position as Unity? Would being a year away from bankruptcy be enough? Should B & T be required to show that there is no potential "white knight" that might rescue it from destruction? Alternatively, we might reduce B & T's obligations instead of eliminating them entirely so that it could limp along, never showing a profit but never going under. That would arguably be an appropriate, constitutional remedy for the threatened harm, the way that transferable use credits can mitigate what would otherwise be a taking when zoning restrictions are at issue. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed.2d 631 (1978). If it is the total destruction of the business that converts the Act into a taking, then perhaps we should simply declare that part of the obligation that will drive B & T out of business a taking and approve the rest. Yet this would only plunge courts further into the intricacies of business finance.

Deciding for Unity and B & T because they will be forced into bankruptcy by the Coal Act would open up a Pandora's

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[16] Breadth of application has its own dangers, however, and one of those dangers is that a law will have irrationally large effects on regulated businesses. Our substantive due process jurisprudence has developed to address this situation, as we discuss *supra* in Section III.

Box that would throw into question every economic regulation imaginable. Companies could adjust their accounting practices to prove that any particular regulation would be enough to destroy them as profitable enterprises. The problem would be compounded if, as counsel for plaintiffs suggested at oral argument, we should evaluate the financial status of an entity without looking at its corporate relatives for takings purposes. A corporation subject to expensive regulation at some of its production facilities could create a series of subsidiaries, each of which would be insolvent on its own if forced to comply with a particular set of regulations, and claim constitutional protection against enforcement of the regulations, even though a different corporate configuration would remain solvent.[17]

A decision on these grounds would also open the door to plaintiffs attempting to choose government regulations from which they wanted to be excused. It is notable that B & T repeatedly discusses its other expensive government imposed obligations, which involve cleaning up polluted coal mines and paying out black lung benefits. The Coal Act alone, according to B & T's submissions, would not necessarily put B & T out

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[17] A supporting *in terrorem* argument is not difficult to devise. For example, an employer could resist an increase in the minimum wage on the ground that the increased cost would drive it out of business. Similarly, many small-business owners find that anti-discrimination laws generate significant expenses, and some might be forced out of business by compliance costs. *See* Mike Hudson, *Jobs for Disabled People: Handicapping Businesses*, Roanoke Times & World News, July 30, 1995, at F1. While such concerns might very well prove overstated in most cases, courts would be forced into the dismal business of economic prediction. Every economic regulation would have to be litigated on a case-by-case basis. *See* Sheila A. Moloney, *The Lady in Red Tape*, Policy Review, Sept./Oct. 1996, at 48 (discussing various regulations that threaten the financial viability of specific businesses, including OSHA safety regulations, FTC franchising rules, ADA accessibility requirements, Endangered Species Act development restrictions, and EPA Superfund clean-up costs).

of business; it is only because the environmental and black lung obligations are so large that this additional expense overwhelms B & T. There is nothing in B & T's constitutional argument about "total takings" that distinguishes its other obligations from those imposed by the Coal Act, nor is there a conceptual reason to confine this definition of total takings to retroactive laws.

We decline to enter into the conceptual morass that would be engendered by the plaintiffs' total takings theory. That a regulation will put a particular plaintiff out of business cannot be proof that a taking has occurred. Instead, the size of the deprivation inflicted by a law must be evaluated in the context of the other relevant facts. In *Connolly*, the Court noted that the MPPAA "completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability." *Connolly*, 475 U.S. at 225. But this did not lead to the conclusion that there had been a taking because "[t]here is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme." *Id.* at 226.

We do not gainsay that the liability imposed on Unity in particular is troubling. Unity's assets are tiny, and its Coal Act liabilities dwarf them. If we uphold the defendants' position, this small family business will be bankrupted instantly. But the size of a liability only weighs in favor of finding a taking insofar as it is out of proportion to the legitimate obligations society may impose on individual entities. And, as we have discussed in Part III, we find the proportionality test satisfied in this instance.

V. CONCLUSION

We hold that Congress could reasonably determine that the plaintiffs, along with other coal operators in similar situations, placed the coal industry retiree benefit funds in jeopardy after creating an expectation of lifetime benefits. Moreover, the actions that created the need for the Coal Act are not so far in the past as to make it fundamentally unjust to impose liability upon the plaintiffs, because the burden is proportional to their contribution to the problem and the retroactivity is not too extensive. We do not deny that Unity, in particular, presents a sympathetic case. This family business has slowly decreased in size as the economic changes of the past decades have buffeted it. Yet small businesses, even businesses that have suffered from the eroding pressures of time and economic change, cannot be immune from reasonable government regulation simply because that regulation has harsh effects. The Coal Act may not be an ideal law; it may not even be a wise one. But its wisdom, or lack thereof, in a particular case does not determine its constitutionality.

For the foregoing reasons, the judgment of the District Court will be affirmed.

ALDISERT, Circuit Judge, concurring:

I agree with the majority's determination that the 1992 Coal Industry Retiree Health Benefit Act, 26 U.S.C. §§ 9701-9722 (1994 and Supp II) ("Coal Act"), as applied to Unity Real Estate Company and Barnes and Tucker Company does not violate substantive due process and is not an unconstitutional taking. I agree also that the retroactive scope of the Act is not beyond appropriate legislative power.

Although Appellants vigorously contend that their cases are analogous to *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed.2d 451 (1998), their analogical argument fails because the decisive material facts of the cases bear no similarity. The decisive material facts in *Eastern*

Enterprises are that the company (1) left the coal industry in 1965 and (2) was never a party to the 1974 and later Wage Agreements that first suggested the commitment to lifetime benefits for retirees and family members. *See Eastern Enterprises*, 118 S. Ct. at 2150 (plurality opinion). Unlike the former coal operator in *Eastern Enterprises*, Appellants remained in the coal industry until 1981 and 1984 respectively, and participated in negotiations for the 1974 and later Wage Agreements. As emphasized in *Eastern Enterprises*, "It is the 1974, 1978 and subsequent agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members." *Id.* Appellants' act of signing the 1974 and subsequent National Bituminous Coal Wage Agreements (NBCWA or "Wage Agreement") precludes the rote application of Eastern Enterprises to these cases.

I.

On the due process question of "promises" and "representations" made to the miners, I would sustain the constitutionality of the Act as applied to the Appellants for one reason only: The evidence before Congress provided a rational basis to believe that a promise of lifetime benefits had been made. Congress relied on the Coal Commission Report, its appendices and the Commissioners' testimony at the Senate hearing. For example, the Coal Commission Report stated:

> The Commission firmly believes that retired miners are entitled to the health care benefits that were promised and guaranteed them and that such commitments must be honored. . . .
>
> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored.

See Supp. App. at 350, 360 (Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree

Health Benefits, Coal Commission Report (1990)). These were important findings that were accepted by Congress.

Whether the Commission Report accurately portrayed the state of affairs in the coal mining industry at the time the 1974 Wage Agreement was negotiated and signed is largely irrelevant to what should be our analysis of the Coal Act's constitutionality. In considering the question of who promised what to whom, I do not believe that it is appropriate for any reviewing court to review *de novo* the history of the agreements or to parse their language.

I say this because, to paraphrase Holmes, "That's not our job."[1] Once we get beyond that portion of the Due Process or Takings Clause analysis relating to the Coal Act's financial effect on the Appellants, we must address whether there was deprivation of property without due process of law on the theory that the Appellants never promised any benefits beyond the lifetime of the Wage Agreements. Our job is not to examine the materials and to make an independent determination of this issue, a sort of ersatz fact-finding by either a federal trial or appellate court.

On this issue, as I see it, our job is merely to determine whether substantial evidence was presented before Congress on this issue. And I conclude that there was. The Coal Commission Report and other testimony before the Senate Committee informed Congress that "[r]etired coal miners have legitimate expectations of health care benefits for life; that was

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[1] Learned Hand once reminisced: "I remember once I was with [Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coup. When we got to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: 'Well, sir, goodbye. Do justice!' . . . He replied: 'That is not my job. My job is to play the game according to the rules.'" Learned Hand, *Continuing Legal Education for Professional Competence and Responsibility, Report on the Arden House Conference*, at 116-123 (1958).

the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored." Supp. App. at 360 (Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits, Coal Commission Report (1990)). This determination serves as the rational basis for the legislation.

Our sole obligation is "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting Sys. Inc. v. Federal Communications Comm'n*, 520 U.S. 180, 195, 117 S. Ct. 1174, 137 L. Ed.2d 369 (1997) (internal quotations omitted). Substantial evidence "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed.2d 490 (1988) (*quoting Consolidated Edison Co. v. National Labor Relations Bd.*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938)). "We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner*, 520 U.S. at 195 (internal quotations omitted). On the basis of the record before Congress, I would conclude that there was substantial evidence to provide Congress with a rational basis for believing that the Coal Act was consistent with promises that had been made by coal operators to their former employees.

II.

Important prudential considerations undergird the Court's limitations on the judicial role. In the case at bar, reasonable persons can differ in evaluating the history of the critical Wage Agreements and interpreting its provisions. For example, although the majority has made a thorough and scholarly analysis of these circumstances, my own conclusions would be

somewhat different. I would not rely on promises and representations made apparently *dehors* the explicit language of the Wage Agreements.

Critical to me is that the Wage Agreements expressly limited all of the promised retiree health benefits to the term of each agreement. Miners who retired after 1975, but whose former employers were no longer in the coal mining business, were promised benefits through the United Mine Workers of America 1974 Benefit Plan and Trust ("1974 Plan"). *See Eastern Enterprises*, 118 S. Ct. at 2139-2140. Article XX(c)(3)(ii) of the NBCWA stated that the purpose of the 1974 Plan was to provide employee health benefits only "during the term of this Agreement." Similarly, Article II of the 1974 Plan expressly stated that if the plan assets were to "become insufficient" to continue providing benefits after the NBCWA had expired, "the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the net assets." The NBCWA contained a "General Description" of all promised benefits that expressly stated that health benefits were "guaranteed" at fixed levels only "during the term of this Agreement." Similar provisions are found or incorporated in other agreements. I simply can find no evidence of any "promise" of lifetime benefits contained in any Wage Agreement. Any reliance on extracontractual "promises" looks to a novel theory of law that turns a blind eye to the centuries-old law of contracts and to the current law on collective bargaining agreements.

To suggest that the clear language limiting benefits to the term of the Wage Agreement is trumped by the "lifetime" health card is a stretch.[2] By analogy, one could say that

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[2] The basis for the claim of a "lifetime" health card is in the "General Description" of the 1974 NBCWA, which states:

> Any pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a

possession of a Social Security card "for life," without more and without any proof of disability, entitles one to benefits.

The "evergreen" clauses included in the 1978 Wage Agreement do not persuade me to reach a different result: My reading of these clauses is that they addressed only employer funding, not the scope of the underlying employee benefits.

As a native of Carnegie, Pennsylvania — a coal mining and steel mill town near Pittsburgh — who is old enough to remember the organizational efforts of John L. Lewis in the coal fields in the 1930s and the 1947 Krug-Lewis Agreement, I no doubt have a unique perspective. I know first-hand the mantra of every coal miner through decades of strikes and picketing: "No Contract, No Work."

To the miner, the actual contract controlled, not the expectation of future agreements. Without the contract in hand, the miners would not pick up their lamps at the lamp house and descend into the shafts. They worked under the precise language in a given contract and under no other representations. The sordid history of the coal company towns that surrounded Carnegie, and the inhumane treatment of the miners and their families prior to effective unionization in the mines, impelled the miners to require thereafter that every representation of working conditions and benefits be set forth in clear language in a hard-fought written collective bargaining agreement.

The foregoing discussion is but my gratuitous interpretation of some of the history and contents of the Wage Agreements, and admittedly, it may be contrary to that expressed in most other judicial opinions. My views and those of judges with contrary interpretations are important in one respect only: My

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health Services card until her death or remarriage.

See Appellants' Supp. Br. at 6-7.

views and those of other judges are totally irrelevant. What is relevant is only that on the basis of evidence before it, Congress concluded that a promise of lifetime benefits had been made. This furnished the rational basis for enacting the controversial provisions of the Coal Act.

III.

This, too, must be said. I am conscious that in light of the view that we take here, the handwriting is on the wall that a kind of hydraulic pressure will generate economic disasters in companies whose financial circumstances are similar to Unity and Barnes and Tucker. Without additional and more realistic Congressional intervention, we may see a phenomenon of the "last man standing," as companies disappear from the economic scene and responsibility for paying benefits shifts to surviving companies. If this case is any example and a forerunner of things to come, the operation of the present statutory solution to the vexing health benefit problem of retirees and their dependents may serve as a full employment program for bankruptcy lawyers of companies unable to make prescribed payments. Sadly, I do not believe that this statement is an *argumentum ad terrorem*.

I join in the judgment of the court.

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA.**

UNITY REAL ESTATE COMPANY,
Plaintiff,
v.
Marty D. HUDSON, et al.,
Defendants,
and
United States of America,
Intervenor-Defendant.

Civil Action No. 93-1802.
March 14, 1997.

MEMORANDUM ORDER

D. BROOKS SMITH, District Judge.

I. INTRODUCTION

This matter is currently before the Court on cross-motions for summary judgment. In a published opinion and order, *Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818 (W.D.Pa. 1995), this Court granted a preliminary injunction in favor of plaintiff Unity Real Estate Co. ("Unity"), finding that Unity had demonstrated a likelihood of succeeding on the merits on its claim that an application of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 (the "Coal Act") would effect an uncompensated "taking" in violation of the Takings Clause of the Fifth Amendment.[1]

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[1] The Fifth Amendment states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

In its motion for summary judgment, Unity reiterates its takings claim, as well as its contention that the liabilities imposed upon it by the Coal Act give rise to due process violations, a claim that this Court rejected at the preliminary injunction stage. *Unity*, 889 F. Supp. at 824-25 (finding Congress had a rational basis for passing the legislation). Defendants, Trustees of the UMWA Combined Benefit Fund and the 1992 UMWA Benefit Plan, assert that new facts and subsequent appellate decisions addressing the Takings Clause issue, including a recent opinion by the Court of Appeals for the Third Circuit, *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996), compel a conclusion that the Coal Act, as applied, does not effect an uncompensated taking.

I agree with the Trustees that recent decisions from the Courts of Appeals and a more complete factual record require a re-examination of Unity's takings claim. Although it is undisputed that enforcement of the Coal Act in this instance will cause severe economic hardship, the current case law now establishes that the Trustees' motion for summary judgment should be granted.

II. FACTUAL FINDINGS

A. Unity and Its Related Companies

In their motion for summary judgment, the Trustees submit new facts regarding Unity and its related coal companies that have been obtained since the preliminary injunction. With a few exceptions, as noted, Unity does not dispute the following facts.

Incorporated in 1947 by members of the Jamison family, Unity currently owns a commercial building and parking lot in Greensburg, Pennsylvania. *Unity*, 889 F. Supp. at 821. With annual gross revenues of approximately $50,000 and a net worth of approximately $85,000, Unity only employs two individuals, an officer at a salary of $7,200 per year, and a janitor. *Id.*

In 1969, Unity became the surviving entity of the merger of three inactive coal companies: South Union Coal Company, Penn View Coal, and Stewart Coke & Coal. Unity is also a successor to two additional coal companies, Jamison Coal Company and Moremet Coal Company. *Unity*, 889 F. Supp. at 821.

The following is a description of the individual coal companies that were merged into or created by Unity.

1. South Union Coal Company

South Union was incorporated in 1922 by the Jamison family. From 1923 through 1961, the company operated two mines in Pennsylvania and West Virginia employing more than 100 UMWA-represented miners at each mine. (Def. facts ¶¶ 43, 44). South Union was signatory to the National Bituminous Coal Wage Agreements ("NBCWA") of 1947 through 1961. (Def. facts ¶ 45).[2] From 1923 to 1941, South Union was a member of the Western Pennsylvania Coal Operators' Association ("WPCOA"), and from 1943 to 1961, it was a member of the Northern West Virginia Coal Operators' Association ("NWVCOA"). (Def. facts ¶ 46). The latter association was a member of the Bituminous Coal Operators' Association, Inc. ("BCOA"). South Union earned a profit in every year from 1946 to 1960. (Def. facts ¶ 49).

In 1961, South Union closed down and remained idle until its merger with Unity in 1969. (Def. facts ¶ 51). At the time of the merger, Unity assumed all of the assets and liabilities of South Union. (Def. facts ¶ 52). Although South Union stopped making payments to the UMWA benefits funds at the

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[2] In its Counter Statement of Material Facts, Unity cites this Court for the statement that South Union was a signatory member of the NBCWA for the years 1950, 1951, 1952, 195[5], 1956 and 1959. (Pl. facts ¶ 10). Most of Unity's facts are drawn from my opinion granting a preliminary injunction.

time it ceased operations in 1961, it was aware that its former employees continued to receive benefits. (Def. facts ¶¶ 53, 54).

2. Penn View Coal

The parties have not provided much information on Penn View Coal. The Jamison family was the major stockholder of Penn View, a strip mining and mine equipment company. (Def. facts ¶ 55). Penn View merged into Unity in 1969. *Id.* The parties do not specify to which NBCWAs Penn View was a signatory. (Pl. objections to def. facts ¶ 2).

3. Stewart Coal & Coke

Stewart was incorporated by the Jamison family in 1949 and family members owned a majority of the stock. (Def. facts ¶ 56). Stewart operated both a coal mine and a coke manufacturing plant, employing approximately sixty UMWA-represented employees. (Def. facts ¶ 57). It had a representative on the WPCOA and made payments to the UMWA benefit funds from 1949 to 1958. (Def. facts ¶¶ 58-59). When it ceased operations in the late 1950s, Stewart stopped paying into the UMWA funds. Its former employees, however, continued receiving benefits. (Def. facts ¶ 60).

In 1970, Unity executed new promissory notes to the Jamison family to replace notes Stewart had given them in the amount of $212,857.70. Unity repaid approximately $80,000 of these notes in 1974 and 1975, $100,000 in 1992, and $52,000 in 1993. (Def. facts ¶¶ 95-98).

4. Jamison Coal Company

Jamison Coal Company was incorporated in 1958. Although the Jamison family controlled the company, Unity purchased more than 15% of its stock at the time of its incorporation. (Def. facts ¶¶ 62, 63). In addition, South Union purchased approximately 41.5% of the stock, Stewart approximately 9%, and members of the Jamison family bought approximately 32.2%. (Def. facts ¶¶ 64- 66).

The Trustees assert that Jamison Coal was a signatory to the NBCWAs, but do not specify which years. Jamison Coal was a board member of the WPCOA. (Def. facts ¶ 68). The company paid into the UMWA Funds from 1961 to 1967, apparently pursuant to the NBCWAs. (Def. facts ¶ 69).

5. Moremet Coal

Unity purchased Moremet Coal Company in 1975 to mine the coal assets it had acquired by its merger with Stewart. (Def. facts ¶ 72). It was a wholly-owned subsidiary of Unity. *Id.* Moremet employed UMWA miners and made payments to the UMWA Funds, but maintained no other benefit plan. (Def. facts ¶¶ 73,74).

6. South Union Coal Company (West Virginia)

South Union-WV was incorporated in 1974 as a wholly-owned subsidiary of Unity. (Def. facts ¶ 75). From 1975 to 1981, South Union-WV operated the Edna, West Virginia coal mine formerly run by South Union-PA. (Def. facts ¶ 77). South Union-WV was a signatory to the 1974, 1978, and 1981 NBCWAs. (Def facts ¶ 76). As a member of both the NWVCOA and the WPCOA, South Union-WV had representatives on both boards. (Def. facts ¶¶ 78,79). David Jamison, Unity's current president, attended meetings of both boards on behalf of South Union-WV. (Def. facts ¶ 80).

South Union-WV employed approximately fifty-five UMWA miners and made payments into the UMWA Funds from 1975 to 1981. (Def. facts ¶ 81, 82). Pursuant to the 1978 NBCWA, South Union-WV provided individual retiree benefits to its former miners. (Def. facts ¶ 84). In 1981, South Union-WV declared liquidation bankruptcy. The bankruptcy court allowed South Union-WV to repudiate the 1981 NBCWA. (Pl.ob.¶ 4).

Unity advanced $243,500 to South Union-WV and paid $186,414 as guarantor on behalf of the company. Unity also indemnified David Jamison and his wife for loan guarantees

they made on behalf of South Union-WV. (Def. facts ¶¶ 93, 94).

Following the bankruptcy, David Jamison notified the UMWA Funds that South Union Coal Company was no longer in business. He stated: "I am aware that the Trustees of the UMWA 1974 Benefit Trust will presently authorize payment of medical and other benefits for eligible former employees of the South Union Coal company and their dependents according to the provisions of the amended 1974 Benefit Plan and Trust. I understand that payment of those benefits will be made in reliance upon this statement that South Union Coal Company is no longer in business." (Def. facts ¶ 88). From 1982 to 1995, Unity paid no federal tax on income of approximately $288,346 because of the carryover of net operating losses attributable to the coal mining operations of South Union-WV. (Def. facts ¶ 87).

B. The Coal Act

The history of the Coal Act has been recited in detail in numerous opinions. *See, e.g., In re Chateaugay Corp.*, 53 F.3d 478, 485-86 (2d Cir. 1995). I will only briefly outline the structure of the Act and its hierarchy of liability. Enacted in 1992 following a divisive coal strike over retiree benefits, the Coal Act's stated purpose was to "identify persons most responsible for [benefit] plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to retirees." Coal Industry Retiree Health Benefit Act of 1992, Pub.L. No. 102-486, § 19142, *reprinted in* 1992 U.S.C.C.A.N. 2776, 3037. A Combined Fund was created to provide benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive benefits or were receiving benefits from an earlier fund. 26 U.S.C. § 9703. Congress created the 1992 UMWA Benefit Plan to "provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund." 26 U.S.C. § 9712(b)(1).

The Coal Act establishes a hierarchy of employers who are designated to pay into the Funds. First, the Secretary of Labor must identify retired coal miners and their dependents who were entitled to health care benefits under the 1974 Funds and assign those beneficiaries to NBCWA signatory coal operators, or related persons,[3] that have remained in business. 26 U.S.C. § 9706. Within that category, the Secretary must assign the beneficiaries to the coal mine operators that most recently employed them for at least two years, and were signatories to 1978 or later NBCWAs. 26 U.S.C. § 9706(a)(1). If no such operator exists, the Secretary then tries to assign the beneficiaries to a pre-1978 signatory operator that employed the beneficiary for the longest period of time. 26 U.S.C. § 9706(a)(3). For each beneficiary assigned to it, the operator must pay a premium to the Combined Fund. 26 U.S.C. § 9704(a).

Pursuant to the Coal Act, the Secretary of Labor initially assigned seventy-eight beneficiaries to Unity based on the employment of sixty-three miners by Unity or its related entities. The average length of employment of the sixty-three miners with Unity or the related coal companies was ten years. Thirty miners worked for the companies for more than ten years and thirteen worked for more than fifteen years. (Def. facts ¶¶ 104-06).

As of September 1995, Unity had seventy-four assigned beneficiaries and owed the Combined Fund $440,694 in unpaid premiums. Unity owed an additional $18,243 to the 1992 UMWA Plan for the benefits of a retired South Union-PA miner and his wife. (Def. facts ¶ 109).

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[3] Unity qualifies as a "related person" under section 9701(c)(2) of the Act. Unity's liability arises because it is a successor in interest to signatory operators that are no longer in business.

III. CONCLUSIONS OF LAW

A. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment may only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The parties agree that there are no genuine issues of material fact and that summary judgment is appropriate.

B. Due Process Challenge

Although this Court found at the preliminary injunction stage that Congress had a rational basis for enacting the Coal Act, *Unity*, 889 F. Supp. at 824-25, Unity renews its due process claim, this time asserting that the retroactive effects of the Coal Act give rise to a violation.

This is precisely the same argument that the Court of Appeals for the Seventh Circuit rejected in *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1122 (7th Cir. 1996). The Court agreed that the Coal Act, as applied to the plaintiffs, was retroactive. Retroactivity did not, however, require courts to exercise a greater degree of scrutiny in reviewing the legislation. On the contrary, courts examine due process challenges to retroactive laws as they do prospective ones by asking the same question: is the legislation justified by "a legitimate legislative purpose furthered by rational means"? *Id.* at 1123 *quoting General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S. Ct. 1105, 1112, 117 L. Ed.2d 328 (1992).

Using this inquiry, the *Davon* Court concluded that Congress acted rationally in enacting the retroactive components of the Coal Act because of four grounds. "First, every NBCWA signatory company profited from the labor of its retired miners." *Id.* at 1124. "Second, every NBCWA

signatory company shared some responsibility in creating a legitimate expectation among miners of lifetime health benefits." *Id.* at 1124-25. "Third, mandatory contributions from all NBCWA signatory companies were necessary to secure adequate funding for the Combined Fund." *Id.* at 1125-26. "Fourth, restricting the statutory obligation to fewer than all NBCWA signatory companies could have resulted in economic conflict in the coal industry." *Id.* at 1126.

Unity raises no new arguments that would dispute the conclusion that Congress acted rationally in giving the Coal Act retroactive effect. Since this Circuit has endorsed the views expressed in *Davon, Lindsey*, 90 F.3d at 694, Unity's due process challenge is rejected.

C. Takings Claim

The Takings Clause of the Fifth Amendment "is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123, 98 S. Ct. 2646, 2659, 57 L. Ed.2d 631 (1978) (*quoting Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed.2d 1554 (1960)). To evaluate a takings challenge to a statute, the Supreme Court has laid out a three-pronged analysis that must be conducted as an "ad hoc" factual inquiry into the circumstances of each case. *Connolly v. Pension Benefit Guaranty*, 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed.2d 166 (1986). Courts must give "particular significance" to three factors: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the statute has interfered with distinct investment-backed expectations; and (3) the nature or character of the government action. *Connolly*, 475 U.S. at 224-25, 106 S. Ct. at 1025-26.

Since the issuance of a preliminary injunction in this case, a number of appellate decisions from other circuits have fleshed out the takings analysis. *See, e.g., In re Blue Diamond Coal*

Co., 79 F.3d 516 (6th Cir. 1996); *Davon*, 75 F.3d at 1114. The Court of Appeals for the Third Circuit has approved these decisions, noting that "[a]s with the Due Process challenge, every court of appeals to consider a 'takings' challenge to the Coal Act has rejected it. We endorse the reasoning of these cases." 90 F.3d at 695 (internal citations omitted).[4]

1. The Nature or Character of the Government Action

The *Davon* and *Blue Diamond* Courts analogized the character of the government action in the Coal Act to the Mutiemployer Pension Plan Amendments Act (the "MPPAA"), which the Supreme Court unanimously held did not effect a taking. *See Connolly*, 475 U.S. at 211, 106 S. Ct. at 1019. "Like the Coal Act, the MPPAA does not permit the government to 'physically invade or permanently appropriate any of the employer's assets for its own use." *Davon*, 75 F.3d at 1129 *quoting Connolly*, 475 U.S. at 225, 106 S. Ct. at 1026. Instead, the "interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and . . . does not constitute a taking requiring Government compensation." *Connolly*, 475 U.S. at 225, 106 S. Ct. at 1026.

At the preliminary injunction stage, this Court stated that "the nature of the governmental action often 'blends' into its analysis of the economic impact of the governmental action on the claimant." *Unity*, 889 F. Supp. at 826. Legislation that goes too far may "be properly characterized as action by the

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[4] The following is a list of the cases with their subsequent procedural history: *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.) *cert. denied*, ___ U.S. ___, 117 S. Ct. 50, 136 L. Ed.2d 14 (1996); *In re Blue Diamond Coal Co.* 79 F.3d 516 (6th Cir. 1996) *cert. denied*, ___ U.S. ___, 117 S. Ct. 682, 136 L. Ed.2d 608 (1997); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.) *cert. denied*, ___ U.S. ___, 116 S. Ct. 64, 133 L. Ed.2d 26 (1995); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.) *cert. denied*, ___ U.S. ___, 116 S. Ct. 298, 133 L. Ed.2d 204 (1995).

government in which it 'permanently appropriate[s] . . . the employer's assets for its own use." *Id.* at 827 *quoting Connolly*, 475 U.S. at 225, 106 S. Ct. at 1026; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922). Thus, a full examination of the nature of the government action turns on an evaluation of the economic impact prong.

2. Economic Impact of the Government Regulation

In the employee benefits realm, the Supreme Court has broken down this prong into three more factors: (1) "mere diminution in the value of property" is insufficient to establish a taking; (2) the employer's liability must not be "out of proportion to [the employer's] experience" with the benefit plan; and (3) the legislation should contain provisions "that moderate and mitigate the economic impact of an individual employer's liability." *Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645, 113 S. Ct. 2264, 2291, 124 L. Ed.2d 539 (1993); *Connolly*, 475 U.S. at 225-26 & n. 8, 106 S. Ct. at 1026-27 & n. 8.

The *Davon* Court explained that the economic impact factor "turns on the question of proportionality." 75 F.3d at 1127. In that case, a consolidated appeal was taken by plaintiff coal companies that had signed the 1950 NBCWA, the reach-back date of the Coal Act. Because the Davon plaintiffs had an even more attenuated connection to the benefit plans than Unity, it is worth describing these companies in some detail.

• Templeton, closed its last mine in 1954 and was no longer engaged in any coal-related enterprise. A signatory to the 1950, 1951 and 1952, NBCWAs, it was assigned thirty-nine beneficiaries.

• Sherwood, sold its last mine in 1960 and was currently operating a business unrelated to coal. Sherwood signed the 1950, 1951, 1952, 1955, and 1958 NBCWAs. It was assigned four beneficiaries.

• Princeton stopped mining in 1966 and was also currently engaged in non-coal activities. Princeton was a signatory to the 1950 NBCWA, as well as the 1951, 1952, 1955, 1956 and 1958 agreements. Princeton was assigned 117 beneficiaries.

• Berwind signed the 1950, 1951, 1952, 1955, 1956, and 1958 NBCWAs. It closed its last mine in 1960; however, in 1963, the company merged with another coal company and its successor entity signed the 1968, 1971, 1974, 1978, and 1981 NBCWAs. Berwind was currently the parent to several coal companies. It was assigned 914 beneficiaries.

• Davon was the successor to the New York Coal Company, which mined from 1933 to 1954. New York was a signatory to the 1950, 1951 and 1952 NBCWAs. In 1954, New York sold its coal mining business to another company and agreed not to engage in coal-related operations. In 1957, New York became Davon, Inc. The Secretary assigned Davon ninety-eight beneficiaries.

The plaintiffs further pointed out that many of the beneficiaries assigned to them had only the weakest connections — some beneficiaries worked for less than a day at the assigned company. *Davon*, 75 F.3d at 1120. Thus, the companies contended that applying the Coal Act to them was an unconstitutional taking, given their relative inexperience with the benefit plans.

The Seventh Circuit first explained that the "important question" was "whether the basis for regulating plaintiffs under the Coal Act — their participation in prior NBCWAs — is proportional to the economic impact caused by the Act." *Id.* at 1128. Rejecting the plaintiffs' argument that their experience was with earlier NBCWAs, not the ones that promised lifetime benefits, the Court reasoned:

> Each consecutive NBCWA, including those after 1974, accomplished the same end — to provide benefits to miners until the next NBCWA — using the same means — funding

> on a multi-employer basis. Nothing radical happened in 1974. As we stated in the due process context, the promise of lifetime benefits was not an unforeseeable inclusion in an NBCWA; every coal operator that participated in the multi-employer plans contributed directly to the retirees' legitimate expectations of lifetime benefits. Plaintiffs' 'experience with the plan[s]' that eventually became the Combined Fund is easily deduced on the facts of this case.

Davon, 75 F.3d at 1128.

In *Blue Diamond*, the coal company was in Chapter 11 bankruptcy and had ceased employing union miners in 1964. The company had terminated its obligations to the UMWA Fund that same year. The Secretary assigned 1400 beneficiaries to Blue Diamond. Although all 1400 had worked for the company at some point, they had retired from other operators. *Blue Diamond*, 79 F.3d at 520.

After rejecting a due process challenge, the Sixth Circuit addressed the company's takings claim, stating that the "proper inquiry under the economic impact prong of the takings inquiry in a multiemployer benefit plan context is whether the plaintiff's liability is proportionate to the plaintiff's experience with the fund at issue." *Id.* at 525. Applying this standard to Blue Diamond, the Court concluded that the company's

> liability under the Coal Act is at least roughly proportional to Blue Diamond's experience with the UMWA Fund. Nearly all of the approximately 1400 living beneficiaries assigned to Blue Diamond either worked for Blue Diamond or were related to someone who worked for Blue Diamond, and Blue Diamond provided service credits to those employees. The beneficiaries assigned to Blue Diamond were assigned to Blue Diamond only after they could not be assigned to a signatory to a more recent NBCWA.

Blue Diamond, 79 F.3d at 525.

This Court's primary concern at the preliminary injunction stage was the apparent lack of proportionality between Unity's liability and its experience with the NBCWAs or the Benefit Trusts. *See Unity*, 889 F. Supp. at 830-31. However, under the reasoning of *Davon* and *Blue Diamond*, it is clear that the proper inquiry must be the relationship between the assigned beneficiaries and their employment by Unity or its related companies. Applying this analysis, Unity's liability is proportional.

During discovery, Unity produced employment records for 536 former employees of its related companies. Of these 536 former employees, 188 were identified as receiving, or as having received before their death, benefits from the UMWA Funds. Of this group, 120 are eligible to receive benefits, either for themselves or their dependents. As of September 1995, Unity has only been assigned seventy-four beneficiaries. Unity does not dispute that all of the retirees assigned to it were once employed by coal companies to which Unity is related, nor does Unity challenge the fact that the assigned beneficiaries worked for its related companies longer than any other signatory operator.

Instead, Unity would have this Court give it special treatment because it is a "related person," not a signatory operator. Congress specifically provided a hierarchy of assignments for imposing liability. Unity was assigned beneficiaries because its related companies employed the miners longer and more recently than any currently operating signatory operator. In *Davon*, liability was imposed upon "related persons" of coal companies that had ceased operations in the 1950s; in *Blue Diamond*, the Court upheld the assignment of beneficiaries to a company that had withdrawn from the UMWA in the 1960s. It cannot be said that Unity's experience with the Benefit Funds or the NBCWAs was any more attenuated.

Moreover, Unity cannot argue that it has not received any benefits from its relation to the coal companies. From 1982 to 1995, Unity paid no federal tax on income of approximately $288,346 because of the carryover of net operating losses attributable to the coal mining operations of South Union-WV. Apparently, Unity's owners decided that it was in their best interest to maintain the company as a successor in interest to the defunct coal companies. After receiving this "benefit," Unity is bound to accept the concurrent liabilities imposed by such a connection.

It is undisputed that enforcement of the Coal Act will have a severe economic impact on Unity, and this Court continues to have concern over the wisdom of legislation that may have the effect of driving a company into bankruptcy. I am persuaded, however, that even when a regulation results in a claimant's loss of property in its entirety, if the government does not appropriate the property for its own use, but instead acts to ensure the stability of a private fund, then no unconstitutional taking can be found. *See Connolly*, 475 U.S. at 225, 106 S. Ct. at 1026 ("Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.").

This conclusion is consistent with a line of Supreme Court decisions which have distinguished between action taken by a government which results in the government's control and dominion over a property interest, and action which does not exert control or dominion over a property interest. *See United States v. General Motors Corporation*, 323 U.S. 373, 378, 65 S. Ct. 357, 359-60, 89 L. Ed. 311 (1945) (compensation for taking of leasehold limited to market value of lease and fixture and permanent equipment destroyed or depreciated and not to consequential damages such as loss of good will or injury to business); *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) (military's easement of flight over

real property was an exercise of complete dominion and control over the land which constituted a taking); *United States v. Central Eureka Mining Company*, 357 U.S. 155, 169, 78 S. Ct. 1097, 1104-05, 2 L. Ed.2d 1228 (1958) (inability to operate gold mine due to government order to close gold mine during World War II resulted in damages which were "incidental to the Government's lawful regulation" and did not effect a taking); and *Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed.2d 1554 (1960) (transfer of marine vessel from builder to government effected a taking since it extinguished the supplier's materialmen lien).

The distinction made in the foregoing cases is significant because "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong*, 364 U.S. at 48, 80 S. Ct. at 1568-69. As the Supreme Court cautioned in *United States v. General Motors Corporation*, 323 U.S. at 378, 65 S. Ct. at 359-60, the "Fifth Amendment concerns itself solely with the 'property,' i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership." This holding was refined in *Armstrong*, which acknowledged "the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable." 364 U.S. at 48, 80 S. Ct. at 1568. This rule that consequential damages do not constitute a compensable taking was embraced again in *Connolly* which noted that the economic impact of the MPPAA upon the employer was "not out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary *consequence* of the MPPAA's regulatory scheme." 475 U.S. at 226, 106 S. Ct. at 1026 (emphasis added).

I agree that Unity's assessment under the Coal Act yields a harsh result. Yet it is a result — a consequence — of an otherwise lawful government regulation, and in no way flows from the exertion of control by the government over a property interest held by Unity. As such, the nature of the governmental action and the economic impact of the regulation weigh in favor of finding that the Coal Act, as applied to Unity, does not offend the Fifth Amendment.

3. Reasonable Investment-Backed Expectations

As to the plaintiffs' reasonable investment-backed expectations, the *Davon* Court framed the issue as "whether the plaintiffs had a 'reasonable expectation that [they] would not be faced with liability for promised benefits.'" *Davon*, 75 F.3d at 1128 *quoting Concrete Pipe*, 508 U.S. at 644-48, 113 S. Ct. at 2291-92. The *Davon* Court held that they did not. First, the government had a long history of intervening in the coal industry. Second, from 1950 onward coal companies "substantially participated in a system that provided continuous benefits and created legitimate expectations that such provisions would not cease." *Id.* at 1129. Thus, "[a]ny expectation that [the companies] could never be held liable for retired miners' health benefits, in light of their participation in the NBCWAs, was not reasonable." *Id.*

The *Blue Diamond* Court also held that the Coal Act did not interfere with reasonable investment-backed expectations. *Blue Diamond*, 79 F.3d at 525. As in *Davon*, the Court cited the federal government's pervasive regulation of the coal mining industry and the coal operator's participation in the "NBCWA system that fostered UMWA members' legitimate expectations of lifetime benefits." *Id.*

As signatories to at least two NBCWA agreements that explicitly promised lifetime benefits, Unity's related companies had more reason to expect some government enforcement in such a heavily regulated industry than the *Blue Diamond* or

Davon plaintiffs. None of those plaintiffs signed an NBCWA that contained express references to benefits "for life," yet both the Sixth and Seventh Circuits held that the companies had substantially participated in a system that fostered the legitimate expectation of lifetime benefits. *See Davon*, 75 F.3d at 1129; *Blue Diamond*, 79 F.3d at 516. Given the holdings of *Davon* and *Blue Diamond*, and their adoption by the Third Circuit in *Lindsey*, at 695, it cannot be said that Unity had a reasonable expectation of avoiding liability.

IV. CONCLUSION

A takings challenge to legislation requires a fact-specific analysis of the circumstances of each case. At the preliminary injunction stage, this Court was faced with a sparse factual record and limited case law interpreting the constitutionality of the Coal Act. Since that time, a more factually developed record, and decisions from the Court of Appeals for the Seventh, Sixth, as well as the Third Circuits, lead to the conclusion that the Coal Act, as applied to Unity, does not violate due process nor effect an unconstitutional taking.

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA**

BARNES & TUCKER COMPANY,

Plaintiff,

vs.

MARTY D. HUDSON, MICHAEL H. HOLLAND, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARLTON R. SICKLES, GAIL R. WILENSKY, and WILLIAM P. HOBGOOD, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, and MARTY D. HUDSON, MICHAEL H. HOLLAND, THOMAS F. CONNORS, and ROBERT WALLACE, TRUSTEES OF THE 1992 UNITED MINE WORKERS OF AMERICA BENEFIT PLAN, DEFENDANTS, and UNITED STATES OF AMERICA,

Defendant-Intervenor.

Civil Action No. 93-264J
Filed March 18, 1997

JUDGES: D. Brooks Smith, United States District Judge.

OPINION: MEMORANDUM and ORDER

SMITH, District Judge

I. INTRODUCTION

Plaintiff, Barnes & Tucker Company (B&T), initiated this civil action in November of 1993 challenging the constitutionality of the Coal Industry Retiree Health Benefit

Act of 1992 ("the Coal Act"), 26 U.S.C. §§ 9701-9722. The Coal Act established a Combined Benefit Fund and a 1992 United Mine Workers of America (UMWA) Benefit Fund to provide retired miners and their dependents health care benefits. The Act assigned responsibility for the health care benefits provided by the funds to those companies which employed the retired miners. B&T received notice of its assessment pursuant to the Coal Act and sued the Trustees of the Combined Fund and the 1992 Benefit Fund asserting that the Act violated the due process and takings clause of the Fifth Amendment[1] to the United States Constitution. The United States subsequently intervened as a defendant. Before the court are motions for summary judgment filed by both the United States and the Trustees. For the reasons set forth below, the motions for summary judgment will be granted.

II. FACTS AND PROCEDURAL HISTORY

B&T is a Pennsylvania corporation with its principal place of business in the Allegheny Mountains region of Western Pennsylvania. Dkt. no. 3, P 7. It was incorporated in 1905 and established a number of subsidiary corporations over the years which were engaged in coal production. B&T's stock was acquired by Alco Standard Corporation in July 1970, after which B&T continued to produce coal as a subsidiary of Alco Standard. Dkt. no. 33, P 16.

"At the peak of its coal mining operation, [B&T] employed approximately 1100 [United Mine Workers Association (UMWA)] miners, and from 1974 through 1982, produced more than 15 million tons of coal. In 1984, [B&T] continued to employ UMWA-represented employees at nine separate

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[1] The Fifth Amendment provides, in relevant part: "No person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V.

facilities, consisting of four deep mines, two cleaning plants, a preparation plant, a loadout facility and a service center." Dkt. no. 28., P 42.

B&T closed its last mining operation, however, before September 1986 and terminated an agreement to manage a mine, effective January 1, 1987. Dkt. no. 28, P 43, dkt. no. 33, P 8. On September 30, 1986, five employees of B&T purchased all of its stock from Alco Standard. B&T's stock continues to be held by those five individuals. Dkt. no. 33, P 16. B&T's primary activities since 1986 consist of "leasing or subleasing small tracts of its coal reserves to third parties, administering and paying hundreds of ongoing workers' compensation and federal black lung claims, and pumping and treating approximately 10,000,000 gallons of acid mine drainage per day from its closed mines." Dkt. no. 33, P 8. In addition, B&T manages its investment portfolio.[2]

During much of its heyday, B&T was a member of the Bituminous Coal Operators' Association, Inc. (BCOA) and a signatory to the National Bituminous Coal Wage Agreements (NBCWAs) of 1971, 1974, 1978, and 1981. It severed its membership with the BCOA prior to the 1984 NBCWA, although it agreed to be bound on a "me-too" basis. Dkt. no. 28, P 44; dkt. no. 33, P 7. The "me-too" agreement executed in 1984 expired on January 31, 1988. Dkt. no. 33, P 7.

The purchase of all of B&T's stock from Alco Standard by the five individual employees on September 30, 1986 occurred after all of B&T's mining operations had ceased. The transaction included a contractual promise from Alco Standard

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[2] B&T's Answer to defendant Trustees' interrogatories in January 1994 indicated that its investment portfolio had a "market value of approximately $ 6 million." Dkt. no. 32, exh. R, attachment 3, P 3. Robert Roland, B&T's vice-president and assistant treasurer, affirmed that as of September 1995 the value of B&T's investment portfolio was $3,250,000. Dkt. no. 32, exh. 5, at 61-62.

"to indemnify [B&T] for 95% of [B&T's] cost of providing health benefits to the UMWA-retirees in its Individual Employer Plan pursuant to commitments which existed on or before September 30, 1986." Dkt. no. 33, P 17.

Subsequently, Congress enacted the Coal Act. Its political and social history is extensive and need not be reiterated here. *See In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S.__ , 116 S. Ct. 298, 133 L. Ed. 2d 204 (1995). For purposes of the motions before me, it is sufficient to note Magistrate Judge Pesto's succinct observation that:

> Congress passed the Coal Act to spread the costs of UMWA benefit plans established and funded by the NBCWAs since 1950. Congress did this by imposing liability for the lifetime health (and other) benefits promised in the NBCWAs to members of the UMWA on entities that had previously signed NBCWAs but which were no longer currently operating under a NBCWA.

Unity Real Estate Co. V. Hudson, 889 F. Supp. 818, 837 (W.D. Pa. 1995). In accordance with the provisions of the Act, the Social Security Administration (SSA) advised B&T by letters dated September 28, 1993, that it had been assigned responsibility for the benefit premiums of 803 miners and 741 dependents, or a total 1,544 beneficiaries.[3] Dkt. no. 29, exh. E, P 14 and exh. H. By letter dated October 22, 1993, B&T advised the Assistant Regional Commissioner of the SSA that it had received the September 28, 1993 notice of assignment and disagreed with its assessment. B&T requested information

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[3] It is not clear from the record how many beneficiaries were assigned initially or even in the years following. The deputy associate commissioner for the SSA affirms that B&T was assigned 1,544 beneficiaries in 1993. Dkt. No. 29, exh. E, P 14. The notice from the Combined Fund to B&T, however, advised that it was assigned 1,239 beneficiaries for the first year. The discrepancy in the number of beneficiaries is not material to the resolution of the pending motions.

regarding the work history and earnings record of each of the beneficiaries. Dkt. no.29, exh. I. By notice of the same date, the Combined Fund advised B&T that the premium due for the first plan year was $1,527,414.42. The premium for the second year was $2,683,786.85. Dkt. no. 3, exh. a. This notice from the Combined Fund was based on a total of 1,239 beneficiaries for the first year and 1,195 beneficiaries for the second year. *Id.*

In addition to pursuing the administrative remedy provided by the act for contesting the assignment of the various beneficiaries, B&T filed this civil action on October 23, 1993. Dkt. no. 1. On November 12, 1993, it filed both an amended complaint which challenged the constitutionality of the Coal Act, and a motion for a preliminary injunction. Dkt. nos. 3 and 4. B&T asserted that the Act, as applied to it, violated the Fifth Amendment by taking its entire net worth without any compensation, and denying it the procedural and substantive due process to which it was entitled. Dkt. no. 3. It also asserted a claim for full reimbursement of all contributions paid to the Combined Fund and the 1992 Benefit Fund. *Id.* at P 65.

The Trustees of the Combined Fund and the 1992 Benefit Fund answered the amended complaint and asserted a counterclaim seeking a declaratory judgment that the Coal Act did not violate the due process or takings clause of the Fifth Amendment. Dkt. no. 8, at 19. In January 1994, the United States was granted leave to intervene. Dkt. no. 10.

The SSA forwarded the requested information for the assigned beneficiaries by letters dated February 10, 1994. Dkt. no. 29, exh. J. B&T requested a review of the assignment of certain beneficiaries by letter dated March 30, 1994. The reasons for the requests varied. For example, it requested a review of several assigned beneficiaries who worked for Imperial Coal Company of Denver, Colorado, an entity separate and distinct from B&T's subsidiary Imperial Coal

Corporation of Pennsylvania. B&T also sought a review of the work histories of employees whose earnings records indicated longer periods of employment with other NBCWA signatories. Dkt. no. 29, exh. K.

By letter dated September 6, 1995, the SSA advised B&T that it had conducted the requested review and had determined that B&T was responsible for the premiums of some, but not all, of the beneficiaries identified in its review request. Dkt. no. 29, exh. L. The SSA advised B&T that the review decision was final.

On October 3, 1995, B&T withdrew its request for a preliminary injunction, Dkt. no. 23, which had been based on a contention that payment of the premiums due would force it into bankruptcy. During the pendency of its motion, the company had initiated an indemnity action against its former parent corporation, Alco Standard, which resulted in a settlement of ten million dollars payable over a five year period. Dkt. no. 22. B&T also entered into a contractual agreement with Inland Industries, Inc., which provided for Inland to pay a percentage of the premiums due for certain beneficiaries assigned to B&T. Dkt. no. 22. It continued to press the underlying civil action, however, contending that it would still be forced into bankruptcy in three to four years, because of the assessments.

By letter dated October 18, 1995, the Combined Fund advised B&T that its monthly premium beginning October 1, 1995 was $211,949.18. This letter also noted that B&T did not have an outstanding liability due from past fiscal years. Dkt. no. 32, exh. Q, attachment 1. This monthly premium was based on an assignment of 1,115 beneficiaries for the fiscal year beginning October 1, 1995. Dkt. no. 32, exh Q, P 8.

On March 15, 1996, the United States moved for summary judgment. Dkt. no. 26. It contended that the Coal Act did not

violate the Fifth Amendment and that B&T was not entitled to full reimbursement for payments to the Combined Fund. The Trustees' motion for summary judgment also asserted that the Coal Act passed constitutional muster. Dkt. no. 31, at 1.

B&T contends that the Coal Act is unconstitutional as applied to it. It asserts that the Coal Act's assessment effects a taking because it is "inexorably consuming the totality of [B&T]'s net worth and will complete the appropriation of [B&T]'s assets approximately four years from the present time." Dkt. no. 36, at 3.

Richard H. Weinzierl, B&T's vice-president and treasurer, attests that it has paid premiums totaling $8,160,933.12 to the Combined Fund, up to September 30, 1996. Premiums paid to the 1992 Fund through September 30, 1996, have totaled $139, 778.19. Dkt. no. 34, P 16. Mr. Weinzierl also affirmed that B&T has experienced a "negative cash flow from operations (excluding settlement with Alco Standard Corporation) in each year" after 1993. *Id.*, P 17. In support of this assertion, Mr. Weinzierl noted that B&T's assessments under the Coal Act for fiscal years 1993 through 1996 exceeded B&T's gross revenues for each year by at least one million dollars. *Id.*, P 19. He concluded that B&T's "liabilities as of 2/29/96 exceed its assets by $18,231,658 to yield a negative equity in that amount." *Id.*, at P 20.

Mr. Weinzierl also stated that neither he nor the other four shareholders would have purchased the company on September 30, 1986 if they had known that Alco Standard would contest its indemnity obligation under subsequent legislation like the Coal Act. Dkt. no. 34, P 15. He further asserts that B&T:

> has done everything it can to reduce its expenses, including abandoning thousands of acres of non-marketable coal reserves to avoid real estate taxes, bringing the administration of certain insurance programs inhouse and

> reducing electric power costs at its water treatment facility by converting to cheaper interruptible electric service. Barnes & Tucker has also done everything it can to raise cash, including asserting claims against other employers for indemnity for Coal Act costs, selling off equipment, real estate, coal reserves and timber and more aggressively investing its dwindling cash assets. There is nothing further Barnes & Tucker can do to prolong its life by diminishing its degree of negative net cash flow.
>
> The Coal Act assessments levied against Barnes & Tucker will inevitably lead to its complete liquidation and ultimate bankruptcy within approximately four years.

Dkt. no. 34, PP 21 and 22.

Mr. Robert Roland, another shareholder of B&T and its vice-president and assistant treasurer, handles B&T's financial matters. Mr. Rowland affirmed that B&T's projected Coal Act liability was less than that originally estimated because the amount of the assessed monthly premiums have decreased from $350,931.77 per month in 1993 to $211,949.18 per month in 1995. Dkt. no. 32, exh. S, at 28-29. In addition, B&T received a settlement from LTR Steel for Coal Act liabilities, dkt. no. 32, exh. S, at 30-31, and B&T's projected Coal Act liability of $23 million in the fall of 1995 did not reflect any of the settlement which it had reached with its former parent, Alco Standard. Id. at 26-37.

III. STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if ... there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue [of material fact] for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

While there are disputes between the parties regarding B&T's financial status, the facts relevant to a determination of the constitutional issues are not in dispute. Accordingly, there is no genuine issue of material fact and the summary judgment motions before me are appropriate.

IV. PROCEDURAL DUE PROCESS

B&T's amended complaint asserts that the Coal Act violates its right to procedural due process under the Fifth Amendment because "it immediately deprives plaintiff of a protected interest in property without affording it an opportunity to contest the deprivation at a meaningful time and in a meaningful manner." Dkt. no. 3, at P 3(e). The United States contends in its summary judgment motion that the Coal Act does not violate the procedural due process guarantee of the Fifth Amendment. Dkt. no. 29, at 23. It points out that § 9706 of the Act establishes an administrative procedure which affords coal operators and "related persons" an opportunity for reconsideration and review of any assignment by the SSA. *See* 26 U.S.C. § 9706. Such procedures have been held by Judge Ambrose of this Court to be "more than adequate to satisfy the constitutional requirements of procedural due process." *Lindsey Coal Mining Company Liquidating Trust v. Shalala*, 901 F. Supp. 959, 966 (W.D. Pa. 1995), *aff'd on other grounds*, 90 F.3d 688, 694 (3d Cir. 1996).

B&T's opposition to the government's motion fails to defend its assertion that the Coal Act violates its right to procedural due process under the Fifth Amendment. In light of B&T's tacit concession, and considering the administrative procedure set forth in § 9706, I concur with Judge Ambrose that the Act does not violate the Fifth Amendment's guarantee of procedural due process. Summary judgment on this issue will be granted in favor of the United States and the Combined Fund.

V. SUBSTANTIVE DUE PROCESS

B&T also asserted that the Coal Act violated its right to substantive due process under the Fifth Amendment to the United States Constitution. This court held in *Unity Real Estate Co. v. Hudson, 889 F. Supp.* 818, 825 (W.D. Pa. 1995), that "it cannot be said that Congress acted irrationally in passing the Coal Act." The thrust of B&T's argument, however, is that the retroactivity of the Coal Act results in a substantive due process violation because it upsets settled expectations and bestows benefits upon the retirees that exceed those promised by B&T under any NBCWA contract. Dkt. no. 36, 15-20.

B&T's retroactivity argument was addressed by the Seventh Circuit in *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir), *cert. denied*, ___U.S.___ , 117 S. Ct. 50, 136 L. Ed. 2d 14 (1996), and rejected. Subsequently, this circuit adopted that analysis in *Lindsey*, 90 F.3d at 693-694. Judge Becker stated "the reporters are full of court of appeals' decision concluding. . . that the Coal Act is rational economic legislation that comports with the substantive requirements of the Due Process Clause. We agree with the views expressed so well in these cases." *Id.* (*citing Davon*, 75 F.3d at 1114, *In re Blue Diamond Coal Co.*, 79 F.3d 516 (6th Cir. 1996), *cert. denied,* 136 L. Ed. 2d 608, 117 S. Ct. 682 (1997); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 133 L. Ed. 2d 26, 116 S. Ct. 64 (1995); *In re Chateaugay Corp.*, 53 F.3d at 478). *See also Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996).

Judge Becker also addressed Lindsey's argument that, "while the Coal Act may contain generally rational classifications, the Act is irrational as applied to it." 90 F.3d at 694. He reasoned that such an "argument cannot sustain a substantive due process challenge. Just because a measure is over- or under- inclusive will not render it irrational." 90 F.3d at 694-95. The focus is upon whether the legislative scheme is

rational and not upon the severity of its impact. This holding applies equally to B&T's assertion that the Act "violates Due Process as applied to Barnes & Tucker." Dkt. no. 36, at 16.

Accordingly, consistent with *Lindsey*, and as I have previously held in *Unity*, summary judgment will be granted in favor of the United States and the Trustees on B&T's substantive due process claim.

VI. TAKINGS CLAIM

The Third Circuit also held in *Lindsey* that the Coal Act as applied to Lindsey did not offend the Takings Clause of the Fifth Amendment. 90 F.3d at 695. The Third Circuit agreed with the district court's application of the three pronged inquiry established in the Supreme Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).[4] It noted that the district court reasoned that:

> (1) the character of the statute does not entail a physical invasion of the property but assesses what is essentially a tax to continue a benefits program; (2) the economic impact on plaintiffs is sufficiently proportionate to the nature of its relationship with beneficiaries; and (3) especially given the heavily regulated nature of the coal industry (including a period of nationalization), any interference with plaintiff's

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[4] The three pronged inquiry focuses upon:

> (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986)(*citing Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)).

> investment backed-expectations is not so severe as to outweigh other factors militating against finding a "taking."

90 F.3d at 695.

The Third Circuit's affirmance of the district court in Lindsey did not include application of any Supreme Court takings jurisprudence to the Coal Act. Instead, the court "endorsed the reasoning" of the courts of appeal which have also rejected a "takings" challenge to the Coal Act, 90 F.3d at 695 (*citing Davon*, 75 F.3d at 1114; *In re Blue Diamond Coal Co.*, 79 F.3d at 516; *Barrick Gold Exploration*, 47 F.3d at 832; and *In re Chateaugay*, 53 F.3d at 478.). In addition, the court cited the fact that the Supreme Court had unanimously "rejected a takings challenge to an analogous statute" in *Lindsey Coal Mining Co. v. Chater.*, 90 F.3d at 695 (*citing* 475 U.S. 211 (1986)).

The *Lindsey* decision's precedential value in this circuit cannot be ignored. B&T argues, however, that the Coal Act as applied to it effects an unconstitutional taking because the magnitude of its assessment bears no relation to its involvement with previous NBCWAs and substantially interferes with the reasonable investment backed expectations of the five shareholders who purchased all of B&T's stock from Alco Standard.

B&T's argument regarding the magnitude of its assessment under the Coal Act addresses not only the economic impact of the Act, but also the nature of the governmental action.. The economic impact analysis in *Davon*, which was embraced by the Third Circuit in *Lindsey,* 90 F.3d at 695 (*citing* 75 F.3d at 1128), requires a determination of whether B&T's assessment under the Coal Act is proportional to its participation in prior NBCWAs. In this case, as in *Davon*, there is a direct relation between B&T's status as a signatory to multiple NBCWAs and its assessment. 75 F.3d at 1128. As a member of the BCOA, B&T was a signatory to multiple NBCWAs from 1971 through

1981. Although it severed its relationship with the BCOA prior to the 1984 NBCWA, it agreed to the terms and conditions of the 1984 NBCWA as a "me-too" signatory. At the height of its mining operations from 1970 to the 1980s, it employed 1100 UMWA miners, and in 1993 was assessed health care premiums under the Coal Act for 1239 to 1544 retired miners and their dependents. *See* dkt. no. 29, exh E, P 14, and exh H; Dkt. no. 3, exh. A.

Despite the proportionality of its assessment under the Coal Act, the economic impact of the Act is devastating for B&T. At first blush, the magnitude of B&T's Coal Act assessment seems to result in a complete appropriation of all of B&T's assets because "the company will be completely destroyed, a result no different than if all of its property had been physically seized immediately."[5] Dkt. no. 36, at 5 n.2. The Supreme Court has stated that a relevant question in takings analysis is "whether the property taken is all, or only a portion of the parcel in question." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust,* 508 U.S. 602, 124 L. Ed. 2d 539, 578, 113 S. Ct. 2264 (1993).

But the Supreme Court also instructs that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong v. United States*, 364 U.S. 40, 48, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960). As the Court recognized in Armstrong, there is difficulty in drawing the line between destructions of property which are compensable and destructions which are "'consequential' and therefore not compensable." 364 U.S. at 48. Drawing the line is made easier, however, when the focus begins with determining whether the governmental action results in the government's control and dominion over a

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[5] B&T concedes that the Coal Act does not "directly authorize seizure or appropriation of real estate, timber, mineral rights and the like. . . ." Dkt. no. 36, at 5 n. 2.

property interest. If so, the appropriation of the property interest as a result of such government action constitutes a taking under the Fifth Amendment which must be compensated. The compensation is limited to the value of the property interest since the "Fifth Amendment concerns itself solely with the 'property,' *i.e.*, with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership." *See United States v. General Motors Corporation*, 323 U.S. 373, 378, 89 L. Ed. 311, 65 S. Ct. 357 (1945)(compensation for taking of leasehold limited to market value of lease and fixtures and permanent equipment destroyed or depreciated and not to consequential damages such as loss of good will or injury to business); *Causby v. United States*, 328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062 (1946) (military's flight easement over real property was tantamount to an exercise of complete dominion and control over land and thereby constituted a taking); *United States v. Central Eureka Mining Company*, 357 U.S. 155, 169, 2 L. Ed. 2d 1228, 78 S. Ct. 1097 (1958)(inability to operate gold mine due to government order to close mine during World War II resulted in damages which were "incidental to the Government's lawful regulation" and in no way associated with any physical possession or occupation of the mine); and *Armstrong*, 364 U.S. at 40 (government acquisition of marine vessel extinguished material supplier's materialmen lien).

This distinction between a taking of property and consequential damages flowing from lawful governmental regulation was applied by the Supreme Court in *Connolly,* 475 U.S. at 211. The plaintiff employers in *Connolly* asserted that the Multiemployer Pension Plan Amendments Act (MPPAA) violated the takings clause of the Fifth Amendment. In addressing the economic impact of the MPPAA, the Court observed that the Act "completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability." 475 U.S. at 225. But this fact alone did not weigh in favor of finding a "taking" because:

> there is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme.

Id. at 226 (emphasis added). The Court's analysis also implicitly characterized the damages flowing from the governmental regulation as consequential inasmuch as it found that the "interference with the property rights of an employer [under the MPPAA] arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation." 475 U.S. at 225.

Similarly, B&T's liability under the Coal Act, though severe, does not constitute a taking. It is a consequence of lawful government regulation and does not flow from any exercise of dominion and control over property held by B&T. My finding that the government has not exercised dominion and control over any property interest of B&T is supported by the evidence of record. B&T states that it "has done everything it can to reduce [sic] its expenses. . . ." Dkt. no. 33, P B.5. It abandoned non-marketable coal reserves to eliminate the need to pay real estate taxes and chose to sell equipment, real estate, coal reserves and timber in an effort to raise cash. B&T also chose to place its cash assets in more aggressive investments in an effort to increase its cash flow. None of these actions were the result of any exercise of dominion or control by the government over property held by B&T, but were instead the consequence of B&T's efforts to meet its assessment under the Coal Act. These decisions are not unlike those faced every day by businesses which must pay a debt, satisfy a judgment, or reduce costs to respond to a declining demand for a product.

B&T may see no practical difference in the eventual result (*i.e.* consequences) than if its property had been physically seized. Takings analysis, however, is not a result-oriented jurisprudence. The determinative factor in this case is the means used and not the result. The consequential insolvency of B&T will not constitute a taking which merits compensation under the Fifth Amendment.

B&T also submits that the Coal Act unequivocally interferes with and wholly upsets B&T's investment backed expectations and weighs in favor of finding a compensable taking. Dkt. no. 36, at 11. B&T's five shareholders contend that when they purchased the company in 1986, their investment was based upon the state of the law which held that an NBCWA signatory that had ceased operating had no obligation to provide UMWA retiree health benefits once that agreement expired. They concede that the Seventh Circuit has concluded otherwise in *Davon*, 75 F.3d at 1129, but submit that its analysis was simplistic. Dkt. no. 36, at 13. *Davon*'s analysis, however, has been embraced by the Third Circuit in *Lindsey* and governs my disposition of this issue. 90 F.3d at 695. Moreover, *Lindsey* specifically agreed with the district court's reasoning that "especially given the heavily regulated nature of the coal industry (including a period of nationalization), any interference with plaintiff's investment backed-expectations is not so severe as to outweigh other factors militating against finding a "'taking.'" *Id.*

The Coal Act, as applied to B&T, does not offend the Fifth Amendment. Summary judgment will be granted for the United States and the Trustees on B&T's takings claim.[6]

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[6] B&T's claim for reimbursement of all contributions paid to the Combined Fund and the 1992 Benefit Fund is moot since the Act does not violate the protections secured by the Fifth Amendment. I need not address B&T's assertion in its Supplement to Opposition to Motions for Summary Judgment that it should be reimbursed or credited for certain overpayments

ORDER

AND NOW, this 18th day of March, 1997, consistent with the foregoing memorandum, it is hereby

ORDERED and DIRECTED that the motions for summary judgment, docket nos. 26 and 30, filed by the United States and the Trustees of the Combined Fund and the 1992 Benefit Fund are GRANTED. The Clerk shall mark this case CLOSED.

BY THE COURT,

D. Brooks Smith
United States District Judge

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to the funds which "resulted from the erroneous setting of the premium at too high a level by the Commissioner of the Social Security Administration." Dkt. no. 41, P 3. This issue has not been developed in this case and the SSA, a necessary party, is not a party to this action. *See* Fed.R.Civ.P. 19(a).

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1974

Effective December 6, 1974

* * *

Article XX—HEALTH AND RETIREMENT BENEFITS

Section (a) **General Purpose**

This Article makes provision for pension, health and other benefits for Employees covered by this Agreement, and for former Employees who were covered under the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"), and for the spouses and dependents of such Employees. The benefits to be provided are as set forth under separate plans and trusts described in Section (b) and (c) of this Article.

A summary of the benefits to be provided appears immediately following this Article.

For purposes of this Article, the 1950 Pension Plan and Trust, the 1974 Pension Plan and Trust, the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust and each of them shall be a continuation of the UMWA Welfare and Retirement Fund of 1950 (hereinafter the 1950 Fund) provided that:

(1) The 1950 Pension Trust shall be solely responsible for all indebtedness, accounts payable, claims, causes of action and other liabilities (except as provided in (2) below) incurred or arising prior to December 6, 1974, and shall likewise be entitled and shall succeed to all assets held in trust by the 1950 Fund and all assets due the 1950 Fund on said date and to all rights heretofore accruing to or exercisable by the 1950 Fund;

(2) For all participants covered by the 1974 Pension Plan and Trust, the 1974 Pension Trust shall assume the liabilities

for pensions including those arising out of past service credits attributable to employment prior to December 6, 1975.

Each participant and beneficiary shall be entitled only to the pension benefits provided and paid from either the 1950 Pension Plan and Trust or the 1974 Pension Plan and Trust, and each participant, beneficiary and dependent shall be entitled only to the benefits provided in and paid from either the 1950 Benefit Trust or the 1974 Benefit Trust.

The general purpose of the plans established by this Article shall be to provide health care for working and retired miners and their dependents; pensions for miners upon their retirement; and health care and financial support for eligible disabled miners, miners' widows and surviving dependents as provided by each of the Trusts and Plans established under this Article.

It is agreed that the Trusts established in this Article are irrevocable Trusts created pursuant to, and within the scope of, Section 302(c) of the Labor-Management Relations Act, 1947, and they shall endure as long as the purposes for their creation shall exist.

Section (b) **1950 Plans and Trusts**

Effective December 6, 1974, the name of the 1950 Fund is changed to the United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust"). The 1950 Pension Trust is incorporated by reference and made a part of this Agreement. The terms of the 1950 Fund are hereby amended by substituting the terms of the 1950 Pension Trust and of the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan"). The 1950 Pension Plan is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1950 Pension Trust are as set forth in the 1950 Pension Plan.

Effective December 6, 1974, there is established a benefit plan and trust, which trust shall be known as the United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Trust"). The 1950 Benefit Trust is incorporated by reference and made a part of this Agreement. The 1950 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1950 Benefit Trust.

Upon the discharge of all its obligations, any remaining assets in either the 1950 Benefit Trust or the 1950 Pension Trust shall, upon termination of such Trusts, be transferred to the 1974 Benefit or Pension Trusts, respectively.

Section (c) **1974 Plans and Trusts**

(1) Effective December 6, 1974, there is established a pension trust to be known as the United Mine Workers of America 1974 Pension Trust ("1974 Pension Trust"), which is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1974 Pension Trust are as set forth in the United Mine Workers of America 1974 Pension Plan ("1974 Pension Plan"), which is incorporated by reference and made a part of this Agreement. This Plan is a continuation of the pension program of the 1950 Fund and is effective December 6, 1974.

(2) Effective December 6, 1974, there is established a benefit plan and trust, which trust shall be known as the United Mine Workers of America 1974 Benefit Plan and Trust ("1974 Benefit Trust"). The 1974 Benefit Trust is incorporated by reference and made a part of this Agreement. The 1974 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1974 Benefit Trust.

Section (d) **Contributions by Employers**

(1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts established in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts established in this Article the amounts specified below based on cents per hour worked by each of the Employer's Employees who perform classified work under this Agreement:

(i) Into the 1950 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 56.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 52.4¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 55.4¢ per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 18.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 18.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 19.0¢ per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 19.2¢ per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, 7.6¢ per ton on each such ton, plus 63.0¢ per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 7.6¢ per ton on

each such ton, plus 66.0¢ per hour on each such hour worked; and

(iv) Into the 1974 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 70.8¢ per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, 77.0¢ per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 88.0¢ per hour on each such hour worked;

(v) In the event that the 1950 Pension Trust, the 1950 Benefit Trust, the 1974 Pension Trust and the 1974 Benefit Trust are not established on the date that any contributions become payable under this Agreement, such contributions shall be paid to the 1950 Fund.

In addition to the contributions indicated above during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hour worked contributions converted to tonnage equivalents):

(i) Into the 1950 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 56.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 52.4¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 55.4¢ per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 18.0¢ per

ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 18.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 19.0¢ per ton on each such ton;

(iii) Into 1974 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 9.4¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 38.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 38.9¢ per ton on each such ton; and

(iv) Into the 1974 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 34.8¢ per ton on each such ton; for the period beginning December 6, 1975 and ending December 6, 1976, 37.2¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 41.7¢ per ton on each such ton.

* * *

SUMMARY OF PRINCIPAL PROVISIONS, UMWA HEALTH AND RETIREMENT BENEFITS

(1) PENSIONS FOR MINERS WHO ARE ALREADY RETIRED:

Formerly at $150 per month, these pensions are to be increased according to the following schedules:

(a) For retired miners who receive state or federal Black Lung benefits, an immediate increase to $200 per month, with a second increase one year after the effective date of this Agreement to $215 per month, and a third increase two years after the effective date of this Agreement to $225 per month.

(b) For retired miners who do not receive state or federal Black Lung benefits, an immediate increase to $200 per month, with a second increase one year after the effective date of this Agreement to $225 per month, and a third increase two years after the effective date of this Agreement to $250 per month.

Any pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a health Services card until her death or remarriage.

(2) PENSIONS FOR MINERS WHO RETIRE AFTER THE EFFECTIVE DATE OF THIS AGREEMENT BUT PRIOR TO JANUARY 1, 1976:

A working miner who retires after the effective date of this Agreement but prior to January 1, 1976 and who is eligible for a pension will receive the same benefit levels as set forth in paragraph (1).

(3) PENSIONS FOR MINERS WHO RETIRE IN 1976:

A working miner who retires at any time in 1976 and who is eligible for a pension under the terms of this Agreement will receive pension benefits based upon an entirely new plan which provides credit for all years worked. Full credit is provided for years worked in mines of signatory Employers; partial credit is provided for years worked in mines of noncontributing Employers.

The earliest retirement age under this Plan will be 55. A miner may retire at 55 with 10 or more years of signatory employment.

Pension credits under the new plan are increased as a miner accumulates more years of signatory employment. Benefits are also increased based upon a miner's age at the time of retirement with maximum benefits payable to miners who retire at the age of 62 or more.

In the first year of this pension plan (1976), the maximum credits are as follows:

- $12.00 per month multiplied by the years of signatory employment for the first 10 years of employment.
- $12.50 per month multiplied by the years of signatory employment for the second 10 years of employment.
- $13.00 per month multiplied by the years of signatory employment for the third 10 years of employment.
- $13.50 per month multiplied by the years of signatory employment for each year over 30 years of employment.

To estimate your pension under the terms of this new Plan, see the table on page 136.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50% of his pension until her death and will retain a Health Services card until her death or remarriage.

As a hedge against the anticipated increase in the cost of living, miners who retire under the new Plan during 1976 will receive a $10 per month increase in 1977.

(4) PENSIONS FOR MINERS WHO RETIRE IN 1977:

Benefits under the new Plan will be increased for miners retiring in 1977. Subject to the same terms as paragraph (3), the maximum benefit schedule applicable in 1977 will be as follows:

- $12.50 per month multiplied by the years of signatory employment for the first 10 years of employment.
- $13.00 per month multiplied by the years of signatory employment for the second 10 years of employment.
- $13.50 per month multiplied by the years of signatory employment for the third 10 years of employment.

- $14.00 per month multiplied by the years of signatory employment for each year over 30 years of employment.

If you retire in 1977, estimate your pension by referring to the table on page 136.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50% of his pension until her death and will retain a Health Services card until her death or remarriage.

(5) PENSIONS FOR DISABLED MINERS

A miner who becomes permanently and totally disabled as the result of a mine accident after the effective date of this Agreement will become eligible for pension benefits according to the following schedule:

(a) If a miner has LESS than ten years of signatory employment at the time of his disabling accident, he will receive a $125-per-month pension for life, and retain his Health Services card for life.

(b) If a miner has TEN years or more of signatory employment at the time of his disabling accident, he will receive an increased pension based upon the years of credited employment which he has accumulated at the time of his disabling accident. If the disabling accident occurs after the effective date of this Agreement but prior to January 1, 1976, the initial pension payment will be $125 per month, but such amount will, effective January 1, 1976, be increased to the pension levels at age 62 shown in the table on page 136. If the disabling accident occurs on or after January 1, 1976, the initial pension levels at age 62 shown on page 136 will apply immediately. (For example, a miner disabled during this period of time who is age 44 and has 22 years of employment, would be eligible effective January 1, 1976 for a disability pension of $271 per month).

If the disabling accident occurs in 1977, the higher schedule of benefits shown in the table on page 136 will apply. (In this case, the example Employee would receive $282 per month.)

A miner who was permanently and totally disabled as the result of a mine accident after May 29, 1946, but prior to the effective date of this Agreement in a then signatory mine, will be eligible, upon application and certification of disability, for a pension of $125 per month for the rest of his life, and will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

(6) PENSIONS FOR WIDOWS:

The new Plan provides, for the first time, for widows' pensions. Benefits will ordinarily be payable according to the following schedule:

(a) If a miner working on or after January 1, 1976, becomes eligible for a pension at any time thereafter, his widow will be entitled to receive a Surviving Spouse pension equal to 50% of his pension until her death; she will retain a Health Services card until her death or remarriage.

(b) If, on or after January 1, 1976, a working miner dies (regardless of cause) and would have been eligible for an immediate pension had he retired on the date of his death, his widow will be eligible for a pension equal to 50% of the pension he would have received, and will receive his pension until her death; she will retain a Health Services card until her death or remarriage.

(7) DEFERRED VESTED PENSION:

If a working miner terminates his employment for any reason after completing 10 years of signatory employment, and before age 55, he will be eligible to receive a pension at age 62, or an actuarially reduced pension at any time after 55. The

widow's pension described in paragraph (6) does not apply to the widow of a miner receiving a deferred vested pension.

(8) BASIC DEATH BENEFITS:

Under the terms of this Agreement, basic death benefits are substantially increased, and will be payable according to the following schedule:

(a) Upon the death of a working miner with one to five dependents, a death benefit of $7,500 will be paid to his widow, or, in the absence of a widow, to his surviving dependents.

(b) Upon the death of a working miner with more than five dependents, a death benefit of $8,000 to $10,000 will be paid to his widow (or, in the absence of a widow, to his surviving dependents), based on an incremental payment of $500 per dependent.

(c) Upon the death of a working miner with no dependents, a death benefit of $2,000 will be paid to his nearest designated survivor; except that if the cause of death was any accident, the death benefit will be $7,500.

(d) Upon the death of a pensioned miner with dependents, a death benefit of $2,500 will be paid to his widow, or, in the absence of a widow, to his surviving dependents.

(e) Upon the death of a pensioned miner with no dependents a death benefit of $2,000 will be paid to his nearest designated survivor.

(9) DEATH BENEFITS WHEN DEATH IS THE RESULT OF A MINE ACCIDENT:

If, after the effective date of this Agreement, a miner is killed in a mine accident, his widow will receive, in addition to the basic death benefit described above, a one-time cash payment of $10,000 plus $100 per month until her death or remarriage. These benefits will be in addition to any pension

to which she may be entitled. In the event that there is no surviving spouse and there is one or more surviving dependent children, the above benefits will be payable to unmarried dependent children until age 22.

(10) HEALTH SERVICES CARD:

Regulations already in effect governing eligibility for Health Services cards are amended to include the following:

(a) A miner who (1) has completed 20 years of credited service, including the required number of years of signatory service, (2) has not attained age 55, and (3) is disabled and receiving Social Security disability insurance benefits will be eligible for a Health Services card.

(b) A working miner who becomes totally disabled due to a compensable disability within 4 years of the date he would be eligible for retirement shall be entitled to a Health Services card while so disabled and during the period for which Workmen's Compensation payments are applicable.

(c) The widow of a miner who retired and received a pension at any time on or after May 29, 1946, will receive, upon approval of application, a Health Services card until her death or remarriage.

(d) The widow of a miner who became permanently and totally disabled as the result of injuries suffered in a mine accident at any time on or after May 29, 1946, will, upon approval of application, receive a Health Services card until her death or remarriage.

(e) The widow of a miner who is currently receiving a pension, or of a miner who receives a pension (other than a deferred vested pension based on less than 20 years of credited service) at any time after the effective date of this Agreement will upon his death retain a Health Services card until her death or remarriage.

(f) Disabled or retarded children of Health Services cardholders will be covered for life, so long as a surviving parent holds the card.

(11) HEALTH CARE:

All current programs administered by the UMWA Health and Retirement Funds will be carried forward and expanded as required to cover additional beneficiaries.

The foregoing summary is subject to the complete description of all benefits provided pursuant to this Agreement, which will be found in the Pension and Health Plans and Trusts adopted as part of this Agreement and incorporated herein by reference under the title "UMWA Health and Retirement Benefits." In case of conflict, the provisions of the Plans and Trusts shall be governing.

* * *

UNITED MINE WORKERS OF AMERICA
1950 BENEFIT PLAN AND TRUST

Adopted December 6, 1974

INTRODUCTION AND STATEMENT OF PURPOSE

Pursuant to Article XX of the Wage Agreement, there is hereby established a benefit plan and trust to be known as the "United Mine Workers of America 1950 Benefit Plan and Trust" (hereinafter referred to as "1950 Benefit Trust") for the purpose of making benefit payments pursuant to the provisions hereof.

The overall purpose of the 1950 Benefit Trust includes, but is not limited to, the following:

(1) Providing beneficiaries of the Trust with quality health care;

(2) Improving the delivery of quality health care services;

(3) Assisting beneficiaries in solving their health needs through education and prevention measures;

(4) Assisting the beneficiaries of the Trust, wherever practical, in improving their general health and living conditions. This could results in such activities as:

(a) Assistance in obtaining federal and/or local government health services;

(b) Assistance in obtaining vocational rehabilitation information and benefits;

(c) Recruiting of health personnel;

(5) Constantly reviewing and improving the effectiveness of the administration of the Benefit Trust.

The provisions of said 1950 Benefit Trust are effective December 6, 1974, and are as set forth below.

* * *

ARTICLE III

* * *

In the event the assets of the 1950 Benefit Trust become insufficient to pay the benefits provided under the Plan, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the assets of the 1950 Benefit Trust.

* * *

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN

Adopted December 6, 1974

Pursuant to Article XX of the Wage Agreement, the United Mine Workers of America 1974 Benefit Plan (hereinafter referred to as the "Plan") provides benefits as hereinafter set forth. The provisions of the Plan are effective December 6, 1974.

* * *

ARTICLE IV

Contributions to the Plan shall be made as provided in Article XX of the Wage Agreement and shall be used to provide death benefits and health care for the (participants and) beneficiaries and their eligible dependents. Any excess of contributions over the cost of providing the benefits pursuant to Article III should be accumulated in a reserve to be used to offset the effects of inflation and the increased cost to the Trust which may develop as the result of National Health Insurance legislation.

In the event the assets of the 1974 Benefit Trust become insufficient to pay the benefits provided hereunder, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the assets of the 1974 Benefit Trust.

* * *

UNITED MINE WORKERS OF AMERICA
1974 BENEFIT TRUST

December 6, 1974

INTRODUCTION AND STATEMENT OF PURPOSE

Pursuant to Article XX of the Wage Agreement, there is hereby established a trust to be known as the "United Mine Workers of America 1974 Benefit Trust" (hereinafter referred to as "1974 Benefit Trust") for the purpose of making benefit payments. The terms and conditions under which those benefits will be provided are as set forth or as may be set forth from time to time in the United Mine Workers of America 1974 Benefit Plan pursuant to Article XX of the Wage Agreement.

The overall purpose of the 1974 Benefit Trust includes, but is not limited to, the following:

(1) Providing beneficiaries of the Trust with quality health care;

(2) Improving the delivery of quality health care services;

(3) Assisting beneficiaries in solving their health needs through education and prevention measures;

(4) Assisting the beneficiaries of the Trust, wherever, practical, in improving their general health and living conditions. This could results in such activities as:

(a) Assistance in obtaining federal and/or local government health services;

(b) Assistance in obtaining vocational rehabilitation information and benefits;

(c) Recruiting of health personnel;

(5) Constantly reviewing and improving the effectiveness of the administration of the Benefit Trust.

The provisions of said 1974 Benefit Trust are effective December 6, 1974 (the "effective date") and are as set forth below.

* * *

ARTICLE II

* * *

C. In the event the assets of the 1974 Benefit Trust become insufficient to pay the benefits provided hereunder, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the assets of the 1974 Benefit Trust.

* * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1978

Effective March 27, 1978

* * *

Article XX—HEALTH AND RETIREMENT BENEFITS

Section (a) General Purpose

This Article makes provision for pension, health and other benefits for Employees covered by this Agreement, and for former Employees who were covered under the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"), and for the spouses and dependents of such Employees. The benefits to be provided are as set forth under separate plans and trusts referred to in Sections (b) and (c) of this Article.

A general description of the benefits to be provided appears immediately following this Article.

For purposes of this Article, the 1950 Pension Plan and Trust, the 1974 Pension Plan and Trust, the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust and each of them shall be a continuation of the benefit program established under the UMWA Welfare and Retirement Fund of 1950 (hereinafter the 1950 Fund) provided that:

(1) The 1950 Pension Trust shall be solely responsible for all indebtedness, accounts payable, claims, causes of action and other liabilities (except as provided in (2) below) incurred or arising prior to December 6, 1974, and shall likewise be entitled and shall succeed to all assets held in trust by the 1950 Fund and all assets due the 1950 Fund on said date and to all rights heretofore accruing to or exercisable by the 1950 Fund;

(2) For all participants covered by the 1974 Pension Plan and Trust, the 1974 Pension Trust has assumed the liabilities

for pensions including those arising out of past service credits attributable to employment prior to December 6, 1975.

Each participant and beneficiary shall be entitled only to the pension benefits provided in and paid from either the 1950 Pension Plan and Trust or the 1974 Pension Plan and Trust and each participant, beneficiary and dependent shall be entitled only to the benefits provided in and paid from the 1950 Benefit Trust, the 1974 Benefit Trust, or the individual benefit plans referred to in Section (c).

The general purpose of the plans referred to in this Article shall be to provide health care for working and retired miners and their dependents; pensions for miners upon their retirement; health care and financial support for eligible disabled miners; and financial support for surviving spouses and surviving dependents provided by each of the Trusts and Plans referred to in the Article.

Except as otherwise specifically set forth in this Article, it is agreed that the Trusts referred to in this Article are irrevocable Trusts created pursuant to, and within the scope of, Section 302(c) of the Labor-Management Relations Act, 1947, and shall endure as long as the purposes for their creation shall exist.

Section (b) **1950 Plans and Trusts**

The United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust") is incorporated by reference and made a part of this Agreement. The terms of the 1950 Fund have heretofore been amended by substituting the terms of the 1950 Pension Trust and of the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan"). The 1950 Pension Plan is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1950 Pension Trust are as set forth in the 1950 Pension Plan.

The United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Trust") is incorporated by reference and made a part of this Agreement. The 1950 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1950 Benefit Trust.

Upon the discharge of all its obligations, any remaining assets in either the 1950 Benefit Trust or the 1950 Pension Trust shall, upon termination of such Trusts, be transferred to the 1974 Benefit or Pension Trusts, respectively.

Section (c) **1974 Plans and Trusts**

(1) The United Mine Workers of America 1974 Pension Trust ("1974 Pension Trust") is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1974 Pension Trust are as set forth in the United Mine Workers of America 1974 Pension Plan ("1974 Pension Plan"), which is incorporated by reference and made a part of this Agreement. This Plan is a continuation of the pension program of the 1950 Fund and was effective December 6, 1974.

(2) The 1974 Benefit Plan and Trust ("1974 Benefit Trust") is incorporated by reference and made a part of this Agreement. The 1974 Benefit Trust provides certain health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1974 Benefit Trust and under the terms of this Article.

(3) (i) Except as provided in (ii) below, effective on June 1, 1978, each signatory Employer shall establish an Employee benefit plan to provide, implemented through an insurance carrier(s), health and other non-pension benefits for its Employees covered by this Agreement as well as pensioners, under the 1974 Pension Plan and Trust, whose last classified

employment was with such Employer. The benefits provided pursuant to such plans shall be guaranteed during the term of this Agreement by each Employer at levels set forth in such plans. Such plans shall also include that each signatory Employer continue to make the death benefit payments in pay status as of December 5, 1977, for deceased Employees and pensioners under the 1974 Pension Plan whose last classified employment was with such Employer, in the same manner and in the same amounts as previously provided for in the 1974 Benefit Plan and Trust. The plans established pursuant to this subsection will be incorporated by reference and made a part of this Agreement, and the terms and conditions under which the health and other non-pension benefits will be provided under such plans are as to be set forth in such plans.

During the interim period commencing on the effective date of this Agreement and ending on May 31, 1978, each Employer shall pay to the 1974 Benefit Trust as provided in Section (d) (1) (iv) of this Article.

(ii) In lieu of (i) above, any signatory Employer may elect to implement the above health benefit coverage through a private insurance carrier(s) on the effective date of this Agreement. Any signatory Employer who elects under this subparagraph (ii) to implement health benefit coverage through a private insurance carrier(s), from the date of this Agreement, shall have no further responsibilities, except as provided in Section (d) (1) (iv), (v) (d) and (vi) (a) of this Article, to make contributions to or otherwise be responsible for benefits provided under the 1974 Benefit Plan and Trust.

(iii) The 1974 Benefit Plan and Trust shall continue after May 31, 1978, for the sole purpose of providing health and other non-pension benefits, during the term of this Agreement, to any retired miner under the 1974 Pension Plan or any successor plan(s) thereto who would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory Employer (including successors and

assigns) from which he retired is no longer in business. Such entitlement shall extend to surviving spouses and other beneficiaries who are eligible for health coverage as a result of their relationship to such a miner whose last classified employment was with a signatory Employer which is no longer in business.

The Union and Trustees shall assist and fully cooperate with the Employers in obtaining all necessary opinion letters, exemptions, or rulings from the Department of Labor, the Internal Revenue Service or other applicable federal agencies, in order to implement the provisions of this subsection so as to ensure compliance with all applicable federal laws and regulations and ensure the deductibility for income tax purposes of any and all contributions made by signatory Employers to the 1974 Benefit Trust and the individual health plans referred to in this Section.

Section (d) **Contributions by Employers**

(1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per hours worked by each of the Employer's Employees who perform classified work under this Agreement.

BCOA may elect to change or convert the cents per ton basis of funding contained herein to a different method of funding so long as such alternate method produces the equivalent contribution to that provided herein on a cents per ton basis. It is further understood that if such election is

exercised all references to cents per ton contributions or obligations arising therefrom in this Article shall be read as to reform such references to the appropriate method of funding.

(i) Into the 1950 Pension Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 95.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 95.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 95.0¢ per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning March 27,1978, and ending March 26, 1979, 35.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 35.5¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 35.5¢ per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 75.0¢ per hour on each such hour worked plus 8.5¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 76.0¢ per hour on each such hour worked plus 8.0¢ per ton on each such ton; for the period beginning March 27, 1980, and ending when this Agreement is terminated, 75.0¢ per hour on each such hour worked plus 8.0¢ per ton on each such ton.

(iv) Into the 1974 Benefit Trust: for the period beginning on March 27, 1978, and ending on April 26, 1978, 16.5¢ per hour on each such hour worked; for the period beginning on April 27,1978, and ending when this Agreement is terminated, 2.0¢ per hour on each such hour worked. Any signatory Employer who does not elect to implement coverage through a private insurance carrier(s) on the effective date of the Agreement shall contribute for the period beginning March 27, 1978, and ending May 31, 1978, an additional 86.0¢ per hour on each such hour worked.

(v) In addition to the contributions indicated above, during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hours worked contributions converted to tonnage equivalents).

(a) Into the 1950 Pension Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 95.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 95.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 95.0¢ per ton on each such ton;

(b) Into the 1950 Benefit Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 35.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 35.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 35.5¢ per ton on each such ton;

(c) Into the 1974 Pension Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 58.5¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 59.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 58.0¢ per ton on each such ton: and

(d) Into the 1974 Benefit Trust: for the period beginning March 27, 1978, and ending March 26, 1979,

1.0¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 1.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 1.0¢ per ton on each such ton.

* * *

Section (h) **Guarantee of 1950 Plans and Trusts and 1974 Plans and Trusts**

Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement.

In order to fully fund these guaranteed benefits the BCOA may increase, not decrease, the rate of contributions to be made to the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement. These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto during the term of this Agreement.

GENERAL DESCRIPTION OF THE HEALTH AND RETIREMENT BENEFITS

The following is a general description of certain information contained in the UMWA 1950 Pension and Benefit Plans and Trusts, the UMWA 1974 Pension Plan and Trust and the individual health and benefit plans. This description is intended merely to highlight certain information; it is not a complete statement of all of the provisions of the Plans and Trusts, nor is it intended to be a Summary Plan Description as defined in the Employee Retirement Income Security Act of 1974, and is qualified in its entirety by, and subject to the more

detailed information contained in the Plans and Trusts, copies of which are on file and available for inspection at the offices of the UMWA Health & Retirement Fund, 2021 K Street, N.W., Washington, D.C.

(1) PENSIONS FOR MINERS RETIRED UNDER THE 1950 PENSION PLAN

Pension payments for the months of February and March, 1978, will be reinstated at prior levels and payment will be made as soon as possible. The differential between pensioners receiving black lung benefits and those not receiving black lung benefits is eliminated. Beginning on the first of the month following the effective date of this Agreement, pension benefits are according to the following schedules:

(a) For pensioners with at least 20 years of credited service who retired on other than a disability pension and who receive state or federal black Lung benefits, the pension is immediately increased on the first of the month following the effective date of this Agreement to $275 per month.

(b) For pensioners with at least 20 years of credited service who retired on other than a disability pension and who do not receive state or federal Black Lung benefits, the pension is immediately increased on the first of the month following the effective date of this Agreement to $275 per month.

(c) For pensioners who retired on a disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement to $130 per month, with a second increase one year later to $135 per month, and a third increase two years later to $137.50 per month. Such pensioner will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

(d) For pensioners with less than 20 years of credited service, the pension is unchanged from prior levels.

Any pensioner who is receiving a disability pension or a pension with at least twenty years of credited service under this Plan is entitled to receive health benefits until death for each month in which he earns less than $200. As in the case of a pensioner, a widow is entitled to receive health benefits until her death or remarriage for each month in which the widow earns less than $200.

(2) PENSIONS FOR MINERS WHO RETIRED UNDER THE 1974 PENSION PLAN PRIOR TO THE EFFECTIVE DATE OF THIS AGREEMENT:

Beginning on the first of the month following the effective date of this Agreement, pension benefits for pensioners who retired prior to the effective date of this Agreement are according to the following schedules:

(a) For pensioners who retired on other than a deferred vested or minimum disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement by $10 per month, with a second increase of $10 per month one year later, and a third increase of $5 per month two years later. Such pensioner will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

(b) For pensioners who retired on a minimum disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement to $130 per month, with a second increase one year later to $135 per month, and a third increase two years later to $137.50 per month. Such pensioner will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

(3) PENSIONS FOR MINERS WHO RETIRE ON OR AFTER THE EFFECTIVE DATE OF THIS AGREEMENT:

A working miner who retires on or after the effective date of this Agreement and who is eligible for a pension under the terms of this Agreement will receive pension benefits based upon the 1974 Pension Plan. Subject to (4) below, full credit is provided for years worked as a classified Employee in mines of signatory Employers.

The earliest retirement age is 55. A miner may retire at 55 with 10 or more years of signatory service.

Pension benefits are increased as a miner accumulates years of signatory service. Benefits are also increased based upon a miner's age at the time of retirement with maximum benefits payable to miners who retire at the age of 62 or more.

For retirement on or after the effective date of this Agreement the maximum benefit schedule is increased to the following:

- $13.50 per month multiplied by the years of signatory service for the first 10 such years, plus
- $14.00 per month multiplied by the years of signatory service for the second 10 such years, plus
- $14.50 per month multiplied by the years of signatory service for the third 10 such years, plus
- $15.00 per month multiplied by the years of signatory service for each such year over 30.

To estimate your pension, use the table on page 172.

(4) SIGNATORY SERVICE:

Effective as of the calendar year 1978, each miner who works at least 1,000 hours in a calendar year as a classified Employee with a signatory Employer will receive credit for a

full year of signatory service for the purpose of determining the amount of the pension. Time spent performing contractual obligations (such as safety inspections, mine committee work, etc.) shall be considered as hours worked in the schedule below. Time spent performing work for the UMWA, its districts and local unions in lieu of regular scheduled classified work for the Employer shall be considered as hours worked in the schedule below. A person who is eligible to receive sickness and accident benefits will receive credit as hours worked in the schedule below, for the period of eligibility. Each miner who works less than 1,000 hours in a calendar year as a classified Employee with a signatory Employer will receive credit for the above purpose for a percentage of a year calculated in accordance with the following schedule:

Hours Worked	Percentage of a Year of Signatory Service
less than 250	0
250 - 499	25%
500 - 749	50%
750 - 999	75%
1,000 or more	100%

For the purpose of calculating benefits and/or determining vesting, employment with the United Mine Workers of America, following classified employment with an Employer, shall be treated as signatory service, provided that the employee does not receive a pension from the United Mine Workers of America Pension Plan based on such service.

(5) PENSIONS FOR DISABLED MINERS:

A miner who becomes permanently and totally disabled as a result of a mine accident after the effective date of this Agreement will become eligible for pension benefits in accordance with the following schedule:

(a) If a miner has less than ten years of signatory service at the time of retirement, the miner will receive a $135 per month pension. Such pensioner will be entitled to retain a Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

(b) If a miner has ten years or more of signatory service at the time of retirement, the miner will receive the greater of the minimum pension payable to a miner with less than ten years of signatory service or a pension based upon the years of signatory service which the miner has accumulated at the time of retirement calculated in accordance with the benefit schedule in (3) above. Such pensioner will be entitled to retain a health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

(6) PENSIONS FOR SURVIVING SPOUSES:

The 1974 Pension Plan provides for Surviving Spouse pensions. Benefits for an eligible surviving spouse will be payable in accordance with the following:

(a) If, on or after the effective date of this Agreement, a working miner dies (regardless of cause) and would have been eligible for an immediate pension had the miner retired on the date of death, the surviving spouse will be eligible for a pension equal to 50% of the pension the miner would have received, and will receive this pension until death. Such surviving spouse will be entitled to retain a Health Services card until death or remarriage.

(b) Upon the death of a pensioner, other than a deferred vested pensioner with less than 20 years of service, he surviving spouse of such pensioner will receive a pension equal to 50% of the pensioner's pension until death. Such surviving spouse will be entitled to retain a Health Services card until death or remarriage.

(c) If a miner working on or after the effective date of this Agreement becomes eligible for a pension, other than a deferred vested pension with less than 20 years of service, at any time thereafter, upon his death after age 55, the surviving spouse will be entitled to receive a Surviving Spouse pension equal to 50% of the miner's pension until death. Such surviving spouse will be entitled to retain a Health Services card until death or remarriage.

(7) DEFERRED VESTED PENSION:

If after the effective date of this Agreement a working miner terminates employment for any reason after completing at least 10 years of signatory employment, and before age 55, the miner will be eligible to receive a pension at age 62, or an actuarially reduced pension at any time after 55. This pension will be calculated in accordance with (3) above. The Surviving Spouse pension described in paragraph (6) does not apply to the surviving spouse of a miner receiving a deferred vested pension with less than 20 years of service.

(8) LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT BENEFITS:

For the first time, effective immediately under the terms of this Agreement, Life and Accidental Death and Dismemberment Insurance benefits will be provided by the Employer for working miners in accordance with the following schedule:

(a) Upon the death of a working miner due to other than violent, external and accidental means, life insurance benefits in the amount of $12,000 will be paid to the miner's named beneficiary. Spouses who are not eligible for surviving spouse pension benefits, will continue eligibility for a Health Services card (also covers dependents) until remarriage or for 60 months, whichever occurs first.

(b) Upon the death of a working miner due solely to violent, external and accidental means, life insurance in the amount of $24,000 will be paid to the miner's named beneficiary. Spouses who are not eligible for surviving spouse pension benefits, will continue eligibility for a Health Services card (also covers dependents) until remarriage or for 60 months, whichever occurs first.

(c) If a working miner should lose 2 or more members due to violent, external and accidental means, the miner shall receive a $12,000 dismemberment benefit. If a working miner shall lose one member due solely to violent, external and accidental means, the miner shall receive a $6,000 dismemberment benefit. A member for the purpose of the above is (i) a hand at or above the wrist, (ii) a foot at or above the ankle or (iii) total loss of vision in one eye.

(d) Accidental death or dismemberment benefits are not payable if caused in whole or in part by disease, bodily or mental infirmity, ptomaine or bacterial infection, hernia, suicide, intentional self-inflicted injury, insurrection or acts of war.

(9) PENSIONER'S DEATH BENEFITS:

(a) Upon the death of a pensioner who has retired under the 1950 Pension Plan, and who is a participant in the 1950 Benefit Plan, a $2,500 lump-sum death benefit will be paid to his widow, or, in the absence of a widow to his dependents, if any; otherwise a $2,000 lump-sum death benefit will be paid to his nearest survivor.

(b) Upon the death of a pensioner who has retired under the 1974 Pension Plan, with other than a deferred vested pension based on less than 20 years of credited service, a $2,500 life insurance benefit will be paid to the named beneficiary of the deceased retiree if such named beneficiary is a surviving spouse or dependent relative;

otherwise a life insurance benefit of $2,000 will be paid to the named beneficiary of such deceased retiree.

(10) HEALTH CARE:

Health benefits are restored for all beneficiaries defined as eligible under the 1950 and 1974 Benefit Plans and Trusts for services rendered on and after the effective date of this Agreement. Such benefits are guaranteed during the term of this Agreement, subject to the terms of this Agreement, at the level of benefits provided in the prior Agreement subject to the following:

(a) Participants in the 1950 Benefit Plan will continue to have their health benefits provided by the UMWA Health and Retirement Funds' 1950 Benefit Plan and Trust. Upon request, the Participant shall receive a copy of the bill for services rendered by the physician, hospital, or clinic.

(b) Working miners will be provided health benefits through their individual Employers, or, until May 31, 1978, through the 1974 Benefit Plan and Trust.

(c) Pensioners, other than deferred vested pensioners with less than 20 years of service, retired under the 1974 Pension Plan will be provided health benefits through the Employer from which they retired.

(d) Pensioners, both regular and disabled, their surviving spouses and dependents, who retired under the 1974 Pension Plan or any successor thereto, whose last classified employment was with a signatory Employer, (including successors and assigns) which is no longer in business will have benefits provided under the 1974 Benefit Plan and Trust.

(e) For new Employees and their dependents, no pregnancy benefits will be provided for a pregnancy which occurs prior to the first day of employment. All other benefits are covered.

(f) Benefits for prescription drugs will be subject to a $5.00 co-payment per prescription up to a $50 annual maximum per family.

(g) Benefits for office visits to physicians, house calls by physicians, in-hospital medical care, visits to a clinic or the out-patient department of a hospital will be subject to a $7.50 per visit co-payment in the case of working miners and their dependents up to an annual maximum of $150 per family and will be subject to a $5.00 per visit co-payment in the case of retired miners (and Surviving Spouses) and their dependents up to an annual maximum of $100 per family.

(h) Spouses of working miners who died, who are not eligible for Surviving Spouse pension benefits, will continue eligibility for health care until remarriage, or for 60 months, whichever occurs first.

(i) Deferred vested pensioners with less than 20 years of service under the 1974 Pension Plan and miners who will receive a pension with less than 20 years of service under the 1950 Pension Plan are ineligible for health care. Disability pensioners under both the 1950 and 1974 Pension Plans will continue to receive their Health Services card.

(j) Disabled or retarded children of Health Services cardholders will be covered for life, so long as a surviving parent holds the card.

* * *

UNITED MINE WORKERS OF AMERICA
1950 BENEFIT PLAN AND TRUST

March 27, 1978

* * *

ARTICLE III

* * *

In the event the assets of the 1950 Benefit Trust become insufficient to pay the benefits provided under the Plan on or after March 27, 1981, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the net assets of the 1950 Benefit Trust.

* * *

UNITED MINE WORKERS OF AMERICA
1974 BENEFIT PLAN AND TRUST

March 27, 1978

* * *

ARTICLE III

* * *

In the event the assets of the 1974 Benefit Trust become insufficient to pay the benefits provided hereunder on or after March 27, 1981, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the net assets of the 1974 Benefit Trust.

* * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1981

Effective June 7, 1981

* * *

Article XX—HEALTH AND RETIREMENT BENEFITS

Section (a) **General Purpose**

This Article makes provision for pension, health and other benefits for Employees covered by this Agreement, and for former Employees who were covered under the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"), and for the spouses and dependents of such Employees. The benefits to be provided are as set forth under separate plans and trusts referred to in Sections (b) and (c) of this Article.

A general description of the benefits to be provided appears immediately following this Article. The specific provisions of the plans will govern in the event of any inconsistencies between the general description and the plans.

For purposes of this Article, the 1950 Pension Plan and Trust, the 1974 Pension Plan and Trust, the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust and each of them shall be a continuation of the benefit program established under the UMWA Welfare and Retirement Fund of 1950 (hereinafter the 1950 Fund) provided that:

(1) The 1950 Pension Trust shall be solely responsible for all indebtedness, accounts payable, claims, causes of action and other liabilities (except as provided in (2) below) incurred or arising prior to December 6, 1974, and shall likewise be entitled and shall succeed to all assets held in trust by the 1950 Fund and all assets due the 1950 Fund on said date and to all rights heretofore accruing to or exercisable by the 1950 Fund;

(2) For all participants covered by the 1974 Pension Plan and Trust, the 1974 Pension Trust has assumed the liabilities for pensions including those arising out of past service credits attributable to employment prior to December 6, 1975.

Each participant and beneficiary shall be entitled only to the pension benefits provided in and paid from either the 1950 Pension Plan and Trust or the 1974 Pension Plan and Trust and each participant, beneficiary and dependent shall be entitled only to the benefits provided in and paid from the 1950 Benefit Trust, the 1974 Benefit Trust, or the individual benefit plans referred to in Section (c).

The general purpose of the plans referred to in this Article shall be to provide health care for working and retired miners and their dependents; pensions for miners upon their retirement: health care and financial support for eligible disabled miners; and financial support for surviving spouses and surviving dependents provided by each of the Trusts and Plans referred to in this Article.

Except as otherwise specifically set forth in this Article, it is agreed that the Trusts referred to in this Article are irrevocable Trusts created pursuant to, and within the scope of, Section 302(c) of the Labor-Management Relations Act, 1947, and shall endure as long as the purposes for their creation shall exist.

Section (b) **1950 Plans and Trusts**

The United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust") is incorporated by reference and made a part of this Agreement. The terms of the 1950 Fund have heretofore been amended by substituting the terms of the 1950 Pension Trust and of the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan"). The 1950 Pension Plan is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1950 Pension Trust are as set forth in the 1950 Pension Plan.

The United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Trust") is incorporated by reference and made a part of this Agreement. The 1950 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1950 Benefit Trust.

Upon the discharge of all its obligations, any remaining assets in either the 1950 Benefit Trust or the 1950 Pension Trust shall, upon termination of such Trusts, be transferred to the 1974 Benefit or Pension Trusts, respectively.

Section (c) **1974 Plans and Trusts**

(1) The United Mine Workers of America 1974 Pension Trust ("1974 Pension Trust") is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1974 Pension Trust are as set forth in the United Mine Workers of America 1974 Pension Plan ("1974 Pension Plan"), which is incorporated by reference and made a part of this Agreement. This Plan is a continuation of the pension program of the 1950 Fund and was effective December 6, 1974.

(2) The 1974 Benefit Plan and Trust ("1974 Benefit Trust") is incorporated by reference and made a part of this Agreement. The 1974 Benefit Trust provides certain health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1974 Benefit Trust and under the terms of this Article.

(3) (i) Each signatory Employer shall establish and maintain an Employee benefit plan to provide, implemented through an insurance carrier(s), health and other non-pension benefits for its Employees covered by this Agreement as well as pensioners, under the 1974 Pension Plan and Trust, whose last signatory classified employment was with such Employer.

The benefits provided by the Employer to its eligible Participants pursuant to such plans shall be guaranteed during the term of this Agreement by that Employer at levels set forth in such plans. Such plans shall also include that each signatory Employer continue to make the death benefit payments in pay status as December 5, 1977, for deceased Employees and pensioners under the 1974 Pension Plan whose last signatory classified employment was with such Employer, in the same manner and in the same amounts as previously provided for in the 1974 Benefit Plan and Trust. The plans established pursuant to this subsection are incorporated by reference and made a part of this Agreement, and the terms and conditions under which the health and other non-pension benefits will be provided under such plans are as to be set forth in such plans.

(ii) The 1974 Benefit Plan and Trust provides health and other non-pension benefits, during the term of this Agreement, to any retired miner under the 1974 Pension Plan or any successor plan(s) thereto who would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory Employer (including successors and assigns) for whom such miner last worked in signatory classified employment is no longer in business. Such entitlement shall extend to surviving spouses and other beneficiaries who are eligible for health coverage as a result of their relationship to such a miner whose last signatory classified employment was with a signatory Employer which is no longer in business. For purposes of determining eligibility under the 1974 Benefit Plan and Trust, an Employer is considered to be "no longer in business" only if the Employer:

(a) has ceased all mining operations and has ceased employing persons under this Wage Agreement, with no reasonable expectation that such operations will start up again; and

(b) is financially unable (through either the business entity that has ceased operations as described in subparagraph (a) above, including such company's successors or assigns, if any, or any other related division, subsidiary, or parent corporation, regardless of whether covered by this Wage Agreement or not) to provide health and other non-pension benefits to its retired miners and surviving spouses.

The Union and Trustees shall assist and fully cooperate with the Employers in obtaining all necessary opinion letters, exemptions, or rulings from the Department of Labor, the Internal Revenue Service or other applicable federal agencies, in order to implement the provisions of this subsection so as to ensure compliance with all applicable federal laws and regulations and ensure the deductibility for income tax purposes of any and all contributions made by signatory Employers to the 1974 Benefit Trust and the individual health plans referred to in this Section.

Section (d) **Contributions by Employers**

(1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per hours worked by each of the Employer's Employees who perform classified work under this Agreement.

BCOA may elect to change or convert the cents per ton basis of funding contained herein to a different method of funding so long as such alternate method produces the

equivalent contribution to that provided herein on a cents per ton basis. It is further understood that if such election is exercised all references to cents per ton contributions or obligations arising therefrom in this Article shall be read as to reform such references to the appropriate method of funding.

(i) Into the 1950 Pension Trust: for the period beginning June 7, 1981, and ending June 6, 1982, 95.0¢ per ton on each such ton; for the period beginning June 7, 1982, and ending June 6, 1983, $1.11 per ton on each such ton; and for the period beginning June 7, 1983, and ending when this Agreement is terminated, $1.11 per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning June 7, 1981, and ending June 6, 1982, 40.0¢ per ton on each such ton; for the period beginning June 7, 1982, and ending June 6, 1983, 40.0¢ per ton on each such ton; and for the period beginning June 7, 1983, and ending when this Agreement is terminated, 41.0¢ per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning June 7, 1981, and ending June 6, 1982, $1.037 per hour on each such hour worked plus 8.0¢ per ton on each such ton; for the period beginning June 7, 1982, and ending June 6, 1983, 99.7¢ per hour on each such hour worked plus 8.0¢ per ton on each such ton; for the period beginning June 7, 1983, and ending when this Agreement is terminated, $1.017 per hour on each such hour worked plus 8.0¢ per ton on each such ton.

(iv) Into the 1974 Benefit Trust: for the period beginning June 7, 1981, and ending when this Agreement is terminated, 0.0¢ per hour on each such hour worked.

(v) In addition to the contributions indicated above, during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator,

procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hours worked contributions converted to tonnage equivalents).

(a) Into the 1950 Pension Trust: for the period beginning June 7, 1981, and ending June 6, 1982, 95.0¢ per ton on each such ton; for the period beginning June 7, 1982, and ending June 6, 1983, $1.11 per ton on each such ton; and for the period beginning June 7, 1983, and ending when this Agreement is terminated, $1.11 per ton on each such ton;

(b) Into the 1950 Benefit Trust: for the period beginning June 7, 1981, and ending June 6, 1982, 40.0¢ per ton on each such ton; for the period beginning June 7, 1982, and ending June 6, 1983, 40.0¢ per ton on each such ton; and for the period beginning June 7, 1983, and ending when this Agreement is terminated, 41.0¢ per ton on each such ton;

(c) Into the 1974 Pension Trust: for the period beginning June 7, 1981, and ending June 6, 1982, 72.8¢ per ton on each such ton; for the period beginning June 7, 1982, and ending June 6, 1983, 70.3¢ per ton on each such ton; and for the period beginning June 7, 1983, and ending when this Agreement is terminated 71.6¢ per ton on each such ton; and

(d) Into the 1974 Benefit Trust: for the period beginning June 7, 1981, and ending when this Agreement is terminated, 0.0¢ per ton on each such ton.

* * *

Section (h) **Guarantee of 1950 Plans and Trusts and 1974 Plans and Trusts**

Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefits Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement.

In order to fully fund these guaranteed benefits the BCOA may increase, not decrease, the rate of contributions to be made to the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement. These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto during the term of this Agreement.

GENERAL DESCRIPTION OF THE HEALTH AND RETIREMENT BENEFITS

The following is a general description of certain information contained in the UMWA 1950 Pension and Benefit Plans and Trusts, the UMWA 1974 Pension Plan and Trust and the individual Employer's benefit plans. This description is intended merely to highlight certain information; it is not a complete statement of all of the provisions of the Plans and Trusts, nor is it intended to be a Summary Plan Description as defined in the Employee Retirement Income Security Act of 1974, and is qualified in its entirety by, and subject to the more detailed information contained in the Plans and Trusts, copies of which are on file and available for inspection at the offices of the UMWA Health & Retirement Fund, 2021 K Street, N.W., Washington, D.C. The specific provisions of the plans will govern in the event of any inconsistencies between the general description and the plans.

(1) PENSIONS FOR MINERS RETIRED UNDER THE 1950 PENSION PLAN:

Beginning on the first of the month following the effective date of this Agreement, pension benefits are according to the following schedules:

(a) For pensioners with at least 20 years of credited service who retired on other than a disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement to $290 per month, with a second increase one year later to $305 per month, and a third increase two years later to $315 per month.

(b) For pensioners who retired on a disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement to $147.50 per month, with a second increase one year later to $152.50 per month, and a third increase two years later to $157.50 per month. Such pensioner will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

Any pensioner who is receiving a disability pension or a pension with at least twenty years of credited service under this Plan is entitled to receive health benefits until death except during any month in which he is regularly employed at an earnings rate equivalent to at least $500 per month. A widow is entitled to receive health benefits until her death or remarriage subject to the same $500 earnings limit.

(1A) 1950 WIDOWS PENSION

A new benefit will be provided through the 1950 Pension Plan to widows of miners who were receiving a 1950 pension at the time of their death. The benefit will begin March 1,

1982 and will be $95 per month. Existing as well as future widows of 1950 Pensioners will receive this benefit.

(2) PENSION FOR MINERS WHO RETIRED UNDER THE 1974 PENSION PLAN PRIOR TO THE EFFECTIVE DATE OF THIS AGREEMENT:

Beginning on the first of the month following the effective date of this Agreement, pension benefits for pensioners who retire prior to the effective date of this Agreement are according to the following schedules:

(a) For pensioners who retired on other than a deferred vested or minimum disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement by $10 per month, with a second increase of $10 per month one year later, and a third increase of $5 per month two years later. Such pensioner will be entitled to retain his Health Services card for life, subject to the $500 earnings limit. Upon his death, his widow will retain a Health Services card until her death or remarriage, subject to the $500 earnings limit.

(b) For pensioners who retired on a minimum disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement to $142.50 per month, with a second increase one year later to $147.50 per month, and a third increase two years later to $150.00 per month. Such pensioner will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage, subject to the $500 earnings limit.

(3) PENSIONS FOR MINERS WHO RETIRE ON OR AFTER THE EFFECTIVE DATE OF THIS AGREEMENT:

A working miner who retires on or after the effective date of this Agreement and who is eligible for a pension under the

terms of this Agreement will receive pension benefits based upon the 1974 Pension Plan. Subject to (4) below, full credit is provided for years worked as a classified Employee in mines of signatory Employers.

The earliest retirement age is 55. A miner may retire at 55 with 10 or more years of signatory service.

- Pension benefits are increased as a miner accumulates years of signatory services. Benefits are also increased based upon a miner's age at the time of retirement with maximum benefits payable to miners who retire at the age of 62 or more.

For retirement during the first two years of this Agreement the maximum benefit schedule is increased to the following:

- $14.50 per month multiplied by the years of signatory service for the first 10 such years, plus
- $15.00 per month multiplied by the years of signatory service for the second 10 such years, plus
- $15.50 per month multiplied by the years of signatory service for the third 10 such years, plus
- $16.50 per month multiplied by the years of signatory service for each such year over 30.

To estimate your pension, use the table on pages 176-77.

For retirement during the third year of this Agreement, the maximum benefit schedule is increased to the following:

- $15.50 per month multiplied by the years of signatory service for the first 10 such years, plus
- $16.00 per month multiplied by the years of signatory service for the second 10 such years, plus
- $16.50 per month multiplied by the years of signatory service for the third 10 such years, plus

- $17.50 per month multiplied by the years of signatory service for each such year over 30.

To estimate your pension, use the table on pages 176-77.

(4) SIGNATORY SERVICE:

Effective as of the calendar year 1978, each miner who works at least 1,000 hours in a calendar year as a classified Employee with a signatory Employer will receive credit for a full year of signatory service for the purpose of determining the amount of the pension. Time spent performing contractual obligations (such as safety inspections, mine committee work, etc.) shall be considered as hours worked in the schedule below. Time spent performing work for the UMWA, its districts and local unions in lieu of regular scheduled classified work for the Employer shall be considered as hours worked in the schedule below. A person who is eligible to receive sickness and accident benefits will receive credit as hours worked in the schedule below, for the period of eligibility. Each miner who works less than 1,000 hours in a calendar year as a classified Employee with a signatory Employer will receive credit for the above purpose for a percentage of a year calculated in accordance with the following schedule:

Hours Worked	Percentage of a Year of Signatory Service
less than 250	0
250 - 499	25%
500 - 749	50%
750 - 999	75%
1,000 or more	100%

For the purpose of calculating benefits and/or determining vesting, employment with the United Mine Workers of America, following classified employment with the Employer, shall be treated as signatory service, provided that the

employee does not receive a pension from the United Mine Workers of America Pension Plan based on such service.

(5) PENSIONS FOR DISABLED MINERS:

A miner who becomes permanently and totally disabled as a result of a mine accident occurring after the effective date of this Agreement will become eligible for pension benefits in accordance with the following schedule:

(a) If a miner has less than ten years of signatory service at the time of retirement, the miner will receive a $145 month pension, if such accident occurred in the first two years of this Agreement; $155 per month, if such accident occurred in the third year of this Agreement. Such pensioner will be entitled to retain a Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage, subject to the $500 earnings limit.

(b) If a miner has ten years or more of signatory service at the time of retirement, the miner will receive the greater of the minimum pension payable to a miner with less than ten years of signatory service or a pension based upon the years of signatory service which the miner has accumulated at the time of retirement calculated in accordance with the benefit schedule in (3) above. Such pensioner will be entitled to retain a Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage, subject to the $500 earnings limit.

(6) PENSIONS FOR SURVIVING SPOUSES:

The 1974 Pension Plan provides for Surviving Spouse pensions. Benefits for an eligible surviving spouse will be payable in accordance with the following:

(a) If, on or after the effective date of this Agreement, a working miner dies (regardless of cause) and would have been eligible for an immediate pension had the miner retired

on the date of death, the surviving spouse will be eligible for a pension equal to 50% of the pension the miner would have received, and will receive this pension until death. Such surviving spouse will be entitled to retain a Health Services card until death or remarriage, subject to the $500 earnings limit.

(b) Upon the death of a pensioner, other than a deferred vested pensioner with less than 20 years of service, the surviving spouse of such pensioner will receive a pension equal to 50% of the pensioner's pension until death. Such surviving spouse will be entitled to retain a Health Services card until death or remarriage, subject to the $500 earnings limit.

(c) If a miner working on or after the effective date of this Agreement becomes eligible for a pension, other than a deferred vested pension with less than 20 years of service, at any time thereafter, upon his death after age 55, the surviving spouse will be entitled to receive a Surviving Spouse pension equal to 50% of the miner's pension until death. Such surviving spouse will be entitled to retain a Health Services card until death or remarriage, subject to the $500 earnings limit.

(7) DEFERRED VESTED PENSION:

(a) If after the effective date of this Agreement a working miner ceases working for any reason, except as provided in (b) below, after completing at least 10 years of signatory employment, and before age 55, the miner will be eligible to receive a pension at age 62, or an actuarially reduced pension at any time after 55. This pension will be calculated in accordance with (3) above.

(b) If after the effective date of this Agreement a working miner ceases working and meets the following criteria:

(i) had 20 years of signatory service on date last worked;

(ii) had attained the age of 50 on the date last worked; and either

(iii) had been laid off and had not refused a recall to the mine from which he was laid off; or

(iv) had been terminated under Article III, Section (j) of the Wage Agreement (or if the miner had not been terminated, there had been a deterioration in physical condition which prevented the miner from performing his regular work as determined by a panel of three physicians, if the degree of such physical deterioration is disputed by the Trustees) and was not employed in the coal industry thereafter;

then the miner will be eligible to receive a pension at age 62, or a pension at any time after age 55, reduced by ¼ of one percent for each full month between the date on which pension benefits begin and the date the miner attains age 62.

(c) Any miner who ceased work prior to the effective date of this Agreement, is eligible to receive a deferred vested pension under the 1974 Pension Plan and satisfies the criteria in (b) above shall have his pension recomputed using the ¼ of one percent reduction based on the formula in effect at his retirement. Such pensioner shall have his pension increased by any increases applicable to Age 55 Retirement which occurred after the date of his retirement and application for pension. Any increase under this paragraph shall be applied prospectively only.

(d) The Surviving Spouse pension described in paragraph (6) does not apply to the surviving spouse of a miner receiving a deferred vested pension with less than 20 years of service.

(8) LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT BENEFITS:

Life an Accidental Death and Dismemberment Insurance benefits are provided by the Employer for working miners in accordance with the following schedule:

(a) Upon the death of a working miner due to other than violent, external and accidental means, life insurance benefits in the amount of $25,000 will be paid to the miner's named beneficiary. Spouses who are not eligible for surviving spouse pension benefits, will continue eligibility for a Health Services card (also covers dependents) until remarriage or for 60 months, whichever occurs first, subject to the $500 earnings limitation.

(b) Upon the death of a working miner due solely to violent, external and accidental means, life insurance in the amount of $50,000 will be paid to the miner's named beneficiary. Spouses who are not eligible for surviving spouse pension benefits, will continue eligibility for a Health Services card (also covers dependents) until remarriage or for 60 months, whichever occurs first, subject to the $500 earnings limitation.

(c) If a working miner should lose 2 or more members due to violent, external and accidental means, the miner shall receive a $25,000 dismemberment benefit. If a working miner shall lose one member due solely to violent, external and accidental means, the miner shall receive a $12,500 dismemberment benefit. A member for the purpose of the above is (i) a hand at or above the wrist, (ii) a foot at or above the ankle or (iii) total loss of vision in one eye.

(d) Accidental death or dismemberment benefits are not payable if caused in whole or in part by disease, bodily or mental infirmity, ptomaine or bacterial infection, hernia, suicide, intentional self-inflicted injury, insurrection or acts of war or is caused by or results from committing or attempting to commit a felony.

(9) PENSIONER'S DEATH BENEFITS:

(a) Upon the death of a pensioner who has retired under the 1950 Pension Plan, and who is a participant in the 1950 Benefit Plan, a $2,500 lump-sum death benefit will be paid to his widow, or, in the absence of a widow to his dependents, if any; otherwise a $2,000 lump-sum death benefit will be paid to his nearest survivor.

(b) Upon the death of a pensioner who has retired under the 1974 Pension Plan, with other than a deferred vested pension based on less than 20 years of credited service, a $2,500 life insurance benefit will be paid to the named beneficiary of the deceased retiree if such named beneficiary is a surviving spouse of dependent relative; otherwise a life insurance benefit of $2,000 will be paid the named beneficiary of such deceased retiree.

(10) HEATH CARE:

Health care benefits are guaranteed during the term of this Agreement subject to the terms of this Agreement at the level of benefits provided in the 1950 Benefit Plan, 1974 Benefit Plan, and the Employer Benefit Plan.

(a) Participants in the 1950 Benefit Plan will continue to have their health benefits provided by the UMWA Health and Retirement Funds' 1950 Benefit Plan and Trust. The Participant shall receive an Explanation of Benefits (EOB) for services rendered by the physician, hospital, or clinic.

(b) Working miners will be provided health benefits through their individual Employer's benefit plan.

(c) Pensioners, other than deferred vested pensioners with less than 20 years of service, retired under the 1974 Pension Plan will be provided health benefits through the Employer from which they retired.

(d) Pensioners, both regular and disabled, their surviving spouses and dependents, who retired under the 1974 Pension Plan or any successor thereto, whose last signatory classified employment was with a signatory Employer, (including successors and assigns) which is no longer in business will have benefits provided under the 1974 Benefit Plan and Trust.

(e) Pregnancy benefits will be provided in the same manner as for any other disability.

(f) Only benefits for prescription drugs (only those drugs requiring a prescription for dispensing) are provided; they will be subject to a $5.00 co-payment per prescription up to a $50 annual maximum per family.

(g) Benefits for office visits to physicians, house calls by physicians, in-hospital medical care, visits to a clinic or the out-patient department of a hospital will be subject to a $7.50 per visit co-payment in the case of working miners and their dependents up to an annual maximum of $150 per family and will be subject to a $5.00 per visit co-payment in the case of retired miners (and Surviving Spouses) and their dependents up to an annual maximum of $100 per family.

(h) Spouses of working miners who died, who are not eligible for Surviving Spouse pension benefits, will continue eligibility for heath care until remarriage, or for 60 months, whichever occurs first, subject to the $500 earnings limit.

(i) Deferred vested pensioners with less than 20 years of service under the 1974 Pension Plan and miners who will receive a pension with less than 20 years of service under the 1950 Pension Plan are ineligible for heath care. Disability pensioners under both the 1950 and 1974 Pension Plans will continue to receive their Health Services card.

(j) Disabled or retarded children of Health Services cardholders will be covered for life, so long as a surviving parent holds the card.

* * *

UNITED MINE WORKERS OF AMERICA
1950 BENEFIT PLAN AND TRUST

JUNE 7, 1981

* * *

ARTICLE III: 1950 BENEFIT PLAN

* * *

In the event the assets of the 1950 Benefit Trust become insufficient to pay the benefits provided under the Plan on or after September 30, 1984, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the net assets of the 1950 Benefit Trust.

* * *

UNITED MINE WORKERS OF AMERICA
1974 BENEFIT PLAN AND TRUST

JUNE 7, 1981

* * *

ARTICLE III: 1974 BENEFIT PLAN

* * *

In the event the assets of the 1974 Benefit Trust become insufficient to pay the benefits provided under the Plan on or after September 30, 1984, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the net assets of the 1974 Benefit Trust.

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1984

Effective October 1, 1984

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Article XX—HEALTH AND RETIREMENT BENEFITS

Section (a) **General Purpose**

This Article makes provision for pension, health and other benefits for Employees covered by this Agreement, and for former Employees who were covered under the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"), and for the spouses and dependents of such Employees. The benefits to be provided are as set forth under separate plans and trusts referred to in Sections (b) and (c) of this Article.

A general description of the benefits to be provided appears immediately following this Article. The specific provisions of the plans will govern in the event of any inconsistencies between the general description and the plans.

For purposes of this Article, the 1950 Pension Plan and Trust, the 1974 Pension Plan and Trust, the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust and each of them shall be a continuation of the benefit program established under the UMWA Welfare and Retirement Fund of 1950 (hereinafter the 1950 Fund) provided that:

(1) The 1950 Pension Trust shall be solely responsible for all indebtedness, accounts payable, claims, causes of action and other liabilities (except as provided in (2) below) incurred or arising prior to December 6, 1974, and shall likewise be entitled and shall succeed to all assets held in trust by the 1950 Fund and all assets due the 1950 Fund on

said date and to all rights heretofore accruing to or exercisable by the 1950 Fund;

(2) For all participants covered by the 1974 Pension Plan and Trust, the 1974 Pension Trust has assumed the liabilities for pensions including those arising out of past service credits attributable to employment prior to December 6, 1975.

Each participant and beneficiary shall be entitled only to the pension benefits provided in and paid from either the 1950 Pension Plan and Trust or the 1974 Pension Plan and Trust and each participant, beneficiary and dependent shall be entitled only to the benefits provided in and paid from the 1950 Benefit Trust, the 1974 Benefit Trust, or the individual benefit plans referred to in Section (c).

The general purpose of the plans referred to in this Article shall be to provide health care for working and retired miners and their dependents; pensions for miners upon their retirement; health care and financial support for eligible disabled miners; and financial support for surviving spouses and surviving dependents provided by each of the Trusts and Plans referred to in this Article.

Except as otherwise specifically set forth in this Article, it is agreed that the Trusts referred to in this Article are irrevocable Trusts created pursuant to, and within the scope of, Section 302(c) of the Labor-Management Relations Act, 1947, and shall endure as long as the purposes for their creation shall exist.

Section (b) **1950 Plans and Trusts**

The United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust") is incorporated by reference and made a part of this Agreement. The terms of the 1950 Fund have heretofore been amended by substituting the terms of the 1950 Pension Trust and of the United Mine Workers of America

1950 Pension Plan ("1950 Pension Plan"). The 1950 Pension Plan is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1950 Pension Trust are as set forth in the 1950 Pension Plan.

The United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Trust") is incorporated by reference and made a part of this Agreement. The 1950 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1950 Benefit Trust.

Upon the discharge of all its obligations, any remaining assets in either the 1950 Benefit Trust or the 1950 Pension Trust shall, upon termination of such Trusts, be transferred to the 1974 Benefit or Pension Trusts, respectively.

Section (c) **1974 Plans and Trusts**

(1) The United Mine Workers of America 1974 Pension Trust ("1974 Pension Trust") is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1974 Pension Trust are as set forth in the United Mine Workers of America 1974 Pension Plan ("1974 Pension Plan"), which is incorporated by reference and made a part of this Agreement. This Plan is a continuation of the pension program of the 1950 Fund and was effective December 6, 1974.

(2) The 1974 Benefit Plan and Trust ("1974 Benefit Trust") is incorporated by reference and made a part of this Agreement. The 1974 Benefit Trust provides certain health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1974 Benefit Trust and under the terms of this Article.

(3) (i) Each signatory Employer shall establish and maintain an Employee benefit plan to provide, implemented through an insurance carrier(s), health and other non-pension benefits for its Employees covered by this Agreement as well as pensioners, under the 1974 Pension Plan and Trust, whose last signatory classified employment was with such Employer. The benefits provided by the Employer to its eligible Participants pursuant to such plans shall be guaranteed during the term of this Agreement by that Employer at levels set forth in such plans. Such plans shall also include that each signatory Employer continue to make the death benefit payments in pay status as of December 5, 1977, for deceased Employees and pensioners under the 1974 Pension Plan whose last signatory classified employment was with such Employer, in the same manner and in the same amounts as previously provided for in the 1974 Benefit Plan and Trust. The plans established pursuant to this subsection are incorporated by reference and made a part of this Agreement, and the terms and conditions under which the health and other non-pension benefits will be provided under such plans are as to be set forth in such plans.

(ii) The 1974 Benefit Plan and Trust provides health and other non-pension benefits, during the term of this Agreement, to any retired miner under the 1974 Pension Plan or any successor plan(s) thereto who would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory Employer (including successors and assigns) for whom such miner last worked in signatory classified employment is no longer in business. Such entitlement shall extend to surviving spouses and other beneficiaries who are eligible for health coverage as a result of their relationship to such a miner whose last signatory classified employment was with a signatory Employer which is no longer in business. For purposes of determining eligibility under the 1974 Benefit Plan and Trust, an Employer is considered to be "no longer in business" only if the Employer:

(a) has ceased all mining operations and has ceased employing persons under this Wage Agreement, with no reasonable expectation that such operations will start up again; and

(b) is financially unable (through either the business entity that has ceased operations as described in subparagraph (a) above, including such company's successors or assigns, if any, or any other related division, subsidiary, or parent corporation regardless of whether covered by this Wage Agreement or not) to provide health and other non-pension benefits to its retired miners and surviving spouses.

The Union and Trustees shall assist and fully cooperate with the Employers in obtaining all necessary opinion letters, exemptions, or rulings from the Department of Labor, the Internal Revenue Service or other applicable federal agencies, in order to implement the provisions of this subsection so as to ensure compliance with all applicable federal laws and regulations and ensure the deductibility for income tax purposes of any and all contributions made by signatory Employers to the 1974 Benefit Trust and the individual health plans referred to in this Section.

Section (d) **Contributions by Employers**

(1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per hours worked

by each of the Employer's Employees who perform classified work under this Agreement.

BCOA may elect to change or convert the cents per ton basis of funding contained herein to a different method of funding so long as such alternate method produces the equivalent contribution to that provided herein on a cents per ton basis. It is further understood that if such election is exercised all references to cents per ton contributions or obligations arising therefrom in this Article shall be read as to reform such references to the appropriate method of funding.

(i) Into the 1950 Pension Trust: for the period beginning October 1, 1984, and ending when this Agreement is terminated, $1.11 per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning October 1, 1984, and ending September 30, 1986, 61.0¢ per ton on each such ton: and for the period beginning October 1, 1986, and ending when this Agreement is terminated, 64.0¢ per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning October 1, 1984, and ending September 30, 1985, $1.03 per hour on each such hour worked plus 7.0¢ per ton on each such ton; for the period beginning October 1, 1985, and ending September 30, 1986, 97.0¢ per hour on each such hour worked plus 6.6¢ per ton on each such ton; for the period beginning October 1, 1986, and ending September 30, 1987, 97.0¢ per hour on each such hour worked plus 6.6¢ per ton on each such ton; for the period beginning October 1, 1987, and ending when this Agreement is terminated, $1.02 per hour on each such hour worked plus 6.6¢ per ton on each such ton.

(iv) Into the 1974 Benefit Trust: for the period beginning October 1, 1984, and ending when this Agreement is terminated, 0.0¢ per hour on each such hour worked.

(v) In addition to the contributions indicated above, during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hours worked contributions converted to tonnage equivalents).

(a) Into the 1950 Pension Trust: for the period beginning October 1, 1984, and ending when this Agreement is terminated, $1.11 per ton on each such ton;

(b) Into the 1950 Benefit Trust: for the period beginning October 1, 1984, and ending September 30, 1986, 61.0¢ per ton on each such ton: and for the period beginning October 1, 1986, and ending when this Agreement is terminated, 64.0¢ per ton on each such ton;

(c) Into the 1974 Pension Trust: for the period beginning October 1, 1984, and ending September 30, 1985, 52.7¢ per ton on each such ton; for the period beginning October 1, 1985, and ending September 30, 1986, 49.1¢ per ton on each such ton; and for the period beginning October 1, 1986, and ending September 30, 1987, 48.7¢ per ton on each such ton; and for the period beginning October 1, 1987, and ending when this Agreement is terminated 50.8¢ per ton on each such ton; and

(d) Into the 1974 Benefit Trust: for the period beginning October 1, 1984, and ending when this Agreement is terminated, 0.0¢ per ton on each such ton.

* * *

Section (h) **Guarantee of 1950 Plans and Trusts and 1974 Plans and Trusts**

Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefits Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement.

In order to fully fund these guaranteed benefits the BCOA may increase, not decrease, the rate of contributions to be made to the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement. These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto during the term of this Agreement.

GENERAL DESCRIPTION OF THE HEALTH AND RETIREMENT BENEFITS

The following is a general description of certain information contained in the UMWA 1950 Pension and Benefit Plans and Trusts, the UMWA 1974 Pension Plan and Trust and the individual Employer's benefit plans. This description is intended merely to highlight certain information; it is not a complete statement of all of the provisions of the Plans and Trusts, nor is it intended to be a Summary Plan Description as defined in the Employee Retirement Income Security Act of 1974, and is qualified in its entirety by, and subject to the more detailed information contained in the Plans and Trusts, copies of which are on file and available for inspection at the offices of the UMWA Health & Retirement Fund, 2021 K Street, N.W., Washington, D.C. The specific provisions of the plans will govern in the event of any inconsistencies between the general description and the plans.

(1) PENSIONS FOR MINERS RETIRED UNDER THE 1950 PENSION PLAN:

Beginning on the first of the month following the effective date of this Agreement, pension benefits are according to the following schedules:

(a) For pensioners with at least 20 years of credited service who retired on other than a disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement to $325 per month, with a second increase effective October 1, 1987 to $335 per month.

(b) For pensioners who retired on a disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement to $167.50 per month, with a second increase effective October 1, 1987 to $177.50 per month. Such pensioner will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

Any pensioner who is receiving a disability pension or a pension with at least twenty years of credited service under this Plan is entitled to receive health benefits until death except during any month in which he is regularly employed at an earnings rate equivalent to at least $500 per month. A widow is entitled to receive health benefits until her death or remarriage subject to the same $500 earnings limit.

(1A) 1950 WIDOWS' PENSION

A Widow's Pension is provided through the 1950 Pension Plan to widows of miners who were receiving a 1950 pension at the time of their death. The benefit is immediately increased to 100 per month with a second increase effective October 1, 1987, to $105 per month. Existing as well as future widows of 1950 Pensioners will receive this benefit.

(2) PENSIONS FOR MINERS WHO RETIRED UNDER THE 1974 PENSION PLAN PRIOR TO THE EFFECTIVE DATE OF THIS AGREEMENT:

Beginning on the first of the month following the effective date of this Agreement, pension benefits for pensioners who retire prior to the effective date of this Agreement are according to the following schedules:

(a) For pensioners who retired on other than a deferred vested or minimum disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement by $10 per month, with a second increase of $10 per month effective October 1, 1987. Such pensioner will be entitled to retain his Health Services card for life, subject to the $500 earnings limit. Upon his death, his widow will retain a Health Services card until her death or remarriage, subject to the $500 earnings limit.

(b) For pensioners who retired on a minimum disability pension, the pension is immediately increased on the first of the month following the effective date of this Agreement to $160.00 per month, with a second increase effective October 1, 1987, to $170.00 per month. Such pensioner will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage, subject to the $500 earnings limit.

(c) For surviving spouses of 1974 pensioners who retired on other than a deferred vested pension, the benefit is immediately increased by $5.00 per month, with a second increase of $5.00 per month effective October 1, 1987. Such surviving spouse will retain a Health Services card until her death or remarriage, subject to the $500 earnings limit.

(3) PENSIONS FOR MINERS WHO RETIRE ON OR AFTER THE EFFECTIVE DATE OF THIS AGREEMENT:

A working miner who retires on or after the effective date of this Agreement and who is eligible for a pension under the terms of this Agreement will receive pension benefits based upon the 1974 Pension Plan. Subject to (4) below, full credit is provided for years worked as a classified Employee in mines of signatory Employers.

The earliest retirement age is 55. A miner may retire at 55 with 10 or more years of signatory service.

Pension benefits are increased as a miner accumulates years of signatory services. Benefits are also increased based upon a miner's age at the time of retirement with maximum benefits payable to miners who retire at the age of 62 or more.

For retirement during the first three years of this Agreement the maximum benefit schedule is increased to the following:

- $16.50 per month multiplied by the years of signatory service for the first 10 such years, plus

- $17.00 per month multiplied by the years of signatory service for the second 10 such years, plus

- $17.50 per month multiplied by the years of signatory service for the third 10 such years, plus

- $18.00 per month multiplied by the years of signatory service for each such year over 30.

To estimate your pension, use the table on pages 224.

For retirement on or after October 1, 1987, the maximum benefit schedule is increased to the following:

- $17.00 per month multiplied by the years of signatory service for the first 10 such years, plus

- $17.50 per month multiplied by the years of signatory service for the second 10 such years, plus

- $18.00 per month multiplied by the years of signatory service for the third 10 such years, plus

- $18.50 per month multiplied by the years of signatory service for each such year over 30.

To estimate your pension, use the table on pages 225.

(4) SIGNATORY SERVICE:

Effective as of the calendar year 1978, each miner who works at least 1,000 hours in a calendar year as a classified Employee with a signatory Employer will receive credit for a full year of signatory service for the purpose of determining the amount of the pension. Time spent performing contractual obligations (such as safety inspections, mine committee work, etc.) shall be considered as hours worked in the schedule below. Time spent performing work for the UMWA, its districts and local unions in lieu of regular scheduled classified work for the Employer shall be considered as hours worked in the schedule below. A person who is eligible to receive sickness and accident benefits will receive credit as hours worked in the schedule below, for the period of eligibility. Each miner who works less than 1,000 hours in a calendar year as a classified Employee with a signatory Employer will receive credit for the above purpose for a percentage of a year calculated in accordance with the following schedule:

Hours Worked	Percentage of a Year of Signatory Service
less than 250	0
250 - 499	25%
500 - 749	50%
750 - 999	75%
1,000 or more	100%

For the purpose of calculating benefits and/or determining vesting, employment with the United Mine Workers of America, following classified employment with the Employer, shall be treated as signatory service, provided that the employee does not receive a pension from the United Mine Workers of America Pension Plan based on such service.

(5) PENSIONS FOR DISABLED MINERS:

A miner who becomes permanently and totally disabled as a result of a mine accident occurring after the effective date of this Agreement will become eligible for pension benefits in accordance with the following schedule:

(a) If a miner has less than ten years of signatory service at the time of retirement, the miner will receive a $165 month pension, if such accident occurred in the first three years of this Agreement; $170 per month, if such accident occurred on or after October 1, 1987. Such pensioner will be entitled to retain a Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage, subject to the $500 earnings limit.

(b) If a miner has ten years or more of signatory service at the time of retirement, the miner will receive the greater of the minimum pension payable to a miner with less than ten years of signatory service or a pension based upon the years of signatory service which the miner has accumulated at the time of retirement calculated in accordance with the

benefit schedule in (3) above. Such pensioner will be entitled to retain a Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage, subject to the $500 earnings limit.

(6) PENSIONS FOR SURVIVING SPOUSES:

The 1974 Pension Plan provides for Surviving Spouse pensions. Benefits for an eligible surviving spouse will be payable in accordance with the following:

(a) If, on or after the effective date of this Agreement, a working miner dies (regardless of cause) and would have been eligible for an immediate pension had the miner retired on the date of death, the surviving spouse will be eligible for a pension equal to 50% of the pension the miner would have received, and will receive this pension until death. Such surviving spouse will be entitled to retain a Health Services card until death or remarriage, subject to the $500 earnings limit.

(b) Upon the death of a pensioner, other than a deferred vested pensioner with less than 20 years of service, the surviving spouse of such pensioner will receive a pension equal to 50% of the pensioner's pension until death. Such surviving spouse will be entitled to retain a Health Services card until death or remarriage, subject to the $500 earnings limit.

(c) If a miner working on or after the effective date of this Agreement becomes eligible for a pension, other than a deferred vested pension with less than 20 years of service, at any time thereafter, upon his death after age 55, the surviving spouse will be entitled to receive a Surviving Spouse pension equal to 50% of the miner's pension until death. Such surviving spouse will be entitled to retain a Health Services card until death or remarriage, subject to the $500 earnings limit.

(6A) PRE-RETIREMENT SURVIVORS PENSION:

The Plan also provides a 50% joint survivor's pension for the spouse of a working miner with 10 years of vested pension rights who dies before retirement age. The pension benefit will be payable to the surviving spouse at the time the miner would have attained age 55.

(7) DEFERRED VESTED PENSION:

(a) If after the effective date of this Agreement a working miner ceases working for any reason, except as provided in (b) below, after completing at least 10 years of signatory employment, and before age 55, the miner will be eligible to receive a pension at age 62, or an actuarially reduced pension at any time after 55. This pension will be calculated in accordance with (3) above.

(b) If after the effective date of this Agreement a working miner ceases working and meets the following criteria:

(i) had 20 years of signatory service on date last worked;

(ii) had attained the age of 50 on the date last worked; and either

(iii) had been laid off and had not refused a recall to the mine from which he was laid off; or

(iv) had been terminated under Article III, Section (j) of the Wage Agreement (or if the miner had not been terminated, there had been a deterioration in physical condition which prevented the miner from performing his regular work as determined by a panel of three physicians, if the degree of such physical deterioration is disputed by the Trustees) and was not employed in the coal industry thereafter;

then the miner will be eligible to receive a pension at age 62, or a pension at any time after age 55, reduced by one-quarter

of one percent for each full month between the date on which pension benefits begin and the date the miner attains age 62.

(c) Any miner who ceased work prior to the effective date of this Agreement, is eligible to receive a deferred vested pension under the 9174 Pension Plan and satisfies the criteria in (b) above shall have his pension recomputed using the ¼ of one percent reduction based on the formula in effect at his retirement. Such pensioner shall have his pension increased by any increases applicable to Age 55 Retirement which occurred after the date of his retirement and application for pension. Any increase under this paragraph shall be applied prospectively only.

(d) The Surviving Spouse pension described in paragraph (6) does not apply to the surviving spouse of a miner receiving a deferred vested pension with less than 20 years of service.

(8) LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT BENEFITS:

Life an Accidental Death and Dismemberment Insurance benefits are provided by the Employer for working miners in accordance with the following schedule:

(a) Upon the death of a working miner due to other than violent, external and accidental means, life insurance benefits in the amount of $30,000 will be paid to the miner's named beneficiary. Spouses who are not eligible for surviving spouse pension benefits, will continue eligibility for a Health Services card (also covers dependents) until remarriage or for 60 months, whichever occurs first, subject to the $500 earnings limitation.

(b) Upon the death of a working miner due solely to violent, external and accidental means, life insurance in the amount of $60,000 will be paid to the miner's named beneficiary. Spouses who are not eligible for surviving spouse pension benefits, will continue eligibility for a Health Services card

(also covers dependents) until remarriage or for 60 months, whichever occurs first, subject to the $500 earnings limitation.

(c) If a working miner should lose 2 or more members due to violent, external and accidental means, the miner shall receive a $30,000 dismemberment benefit. If a working miner shall lose one member due solely to violent, external and accidental means, the miner shall receive a $15,000 dismemberment benefit. A member for the purpose of the above is (i) a hand at or above the wrist, (ii) a foot at or above the ankle or (iii) total loss of vision in one eye.

(d) Accidental death or dismemberment benefits are not payable if caused in whole or in part by disease, bodily or mental infirmity, ptomaine or bacterial infection, hernia, suicide, intentional self-inflicted injury, insurrection or acts of war or is caused by or results from committing or attempting to commit a felony.

(9) PENSIONER'S DEATH BENEFITS:

(a) Upon the death of a pensioner who has retired under the 1950 Pension Plan, and who is a participant in the 1950 Benefit Plan, a $2,500 lump-sum death benefit will be paid to his widow, or, in the absence of a widow to his dependents, if any; otherwise a $2,000 lump-sum death benefit will be paid to his nearest survivor.

(b) Upon the death of a pensioner who has retired under the 1974 Pension Plan, with other than a deferred vested pension based on less than 20 years of credited service, a $2,500 life insurance benefit will be paid to the named beneficiary of the deceased retiree if such named beneficiary is a surviving spouse of dependent relative; otherwise a life insurance benefit of $2,000 will be paid to the named beneficiary of such deceased retiree.

(10) HEATH CARE:

Health care benefits are guaranteed during the term of this Agreement subject to the terms of this Agreement at the level of benefits provided in the 1950 Benefit Plan, 1974 Benefit plan, and the Employer Benefit Plan.

(a) Participants in the 1950 Benefit Plan will continue to have their health benefits provided by the UMWA Health and Retirement Funds' 1950 Benefit Plan and Trust. The Participant shall receive an Explanation of Benefits (EOB) for services rendered by the physician, hospital, or clinic.

(b) Working miners will be provided health benefits through their individual Employer's benefit plan.

(c) Pensioners, other than deferred vested pensioners with less than 20 years of service retired under the 1974 Pension Plan will be provided health benefits through the Employer from which they retired.

(d) Pensioners, both regular and disabled, their surviving spouses and dependents, who retired under the 1974 Pension Plan or any successor thereto, whose last signatory classified employment was with a signatory Employer, (including successors and assigns) which is no longer in business will have benefits provided under the 1974 Benefit Plan and Trust.

(e) Pregnancy benefits will be provided in the same manner as for any other disability.

(f) Only benefits for prescription drugs (only those drugs requiring a prescription for dispensing) are provided; they will be subject to a $5.00 co-payment per prescription up to a $50 annual maximum per family.

(g) Benefits for office visits to physicians, house calls by physicians, in-hospital medical care, visits to a clinic or the out-patient department of a hospital will be subject to a $7.50 per visit co-payment in the case of working miners and their

dependents up to an annual maximum of $150 per family and will be subject to a $5.00 per visit co-payment in the case of retired miners (and Surviving Spouses) and their dependents up to an annual maximum of $100 per family.

(h) Spouses of working miners who died, who are not eligible for Surviving Spouse pension benefits, will continue eligibility for heath care until remarriage, or for 60 months, whichever occurs first, subject to the $500 earnings limit.

(i) Deferred vested pensioners with less than 20 years of service under the 1974 Pension Plan and miners who will receive a pension with less than 20 years of service under the 1950 Pension Plan are ineligible for heath care. Disability pensioners under both the 1950 and 1974 Pension Plans will continue to receive their Health Services card.

(j) Disabled or retarded children of Health Services cardholders will be covered for life, so long as a surviving parent holds the card.

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UNITED MINE WORKERS OF AMERICA
1950 BENEFIT PLAN AND TRUST

October 1, 1984

* * *

ARTICLE III

* * *

In the event the assets of the 1950 Benefit Trust become insufficient to pay the benefits provided under the Plan on or after January 31, 1988, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the net assets of the 1950 Benefit Trust.

* * *

UNITED MINE WORKERS OF AMERICA
1974 BENEFIT PLAN AND TRUST

October 1, 1984

* * *

ARTICLE III

* * *

In the event the assets of the 1974 Benefit Trust become insufficient to pay the benefits provided under the Plan on or after January 31, 1988, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the net assets of the 1974 Benefit Trust.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. V:—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Coal Industry Retiree Health Benefit Act of 1992:

26 U.S.C. § 9701. Definitions of general applicability

(a) Plans and funds.—For purposes of this chapter—

(1) UMWA Benefit Plan.—

(A) In general.—The term "UMWA Benefit Plan" means a plan—

(i) which is described in section 404(c), or a continuation thereof; and

(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

(B) 1950 UMWA Benefit Plan.—The term "1950 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

(C) 1974 UMWA Benefit Plan.—The term "1974 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

(2) 1950 UMWA Pension Plan.—The term "1950 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

(3) 1974 UMWA Pension Plan.—The term "1974 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

(4) 1992 UMWA Benefit Plan.—The term "1992 UMWA Benefit Plan" means the plan referred to in section 9713A.

(5) Combined Fund.—The term "Combined Fund" means the United Mine Workers of America Combined Benefit Fund established under section 9702.

(b) Agreements.—For purposes of this section—

(1) Coal wage agreement.—The term "coal wage agreement" means—

(A) the National Bituminous Coal Wage Agreement, or

(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and

described in section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

(2) Settlors.—The term "settlors" means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the "BCOA").

(3) National Bituminous Coal Wage Agreement.—The term "National Bituminous Coal Wage Agreement" means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

(c) Terms relating to operators.—For purposes of this section—

(1) Signatory operator.—The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

(2) Related persons.—

(A) In general.—A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that

this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for determination.—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

(3) 1988 agreement operator.—The term "1988 agreement operator" means—

(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

(4) Last signatory operator.—The term "last signatory operator" means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

(5) Assigned operator.—The term "assigned operator" means, with respect to an eligible beneficiary defined in

section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

(6) Operators of dependent beneficiaries.—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

(7) Business.—For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

(d) Enactment date.—For purposes of this chapter, the term "enactment date" means the date of the enactment of this chapter.

26 U.S.C. § 9702. Establishment of the United Mine Workers of America Combined Benefit Fund

(a) Establishment.—

(1) In general.—As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

(2) Merger of retiree benefit plans.—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be

merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

(3) Treatment of plan.—The Combined Fund shall be—

(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

(4) Tax treatment.—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

(b) Board of trustees.—

(1) In general.—For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

(C) two individuals designated by the United Mine Workers of America; and

(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

(2) Successor trustees.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded.

The plan establishing the Combined Fund shall provide for the removal of trustees.

(3) Special rules.—

(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

(B) Former signatories.—The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

(c) Plan year.—The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

26 U.S.C. § 9703. Plan benefits

(a) In general.—Each eligible beneficiary of the Combined Fund shall receive—

(1) health benefits described in subsection (b), and

(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

(b) Health benefits.—

(1) In general.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

(2) Plan payment rates.—

(A) In general.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

(B) Reductions.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

(ii) by the amount reserved for plan administration under subsection (d).

(C) Increases.—The amount determined under subparagraph (A)(ii) shall be increased—

(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

(ii) by any carryover to the plan year from any preceding plan year which—

(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

(II) the trustees elect to use to pay benefits for the current plan year, and

(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

(3) Qualified providers.—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

(4) Effective date.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

(c) Death benefits coverage.—

(1) In general.—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

(2) Termination of coverage.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not

be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

(d) Reserves for administration.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

(e) Limitation on enrollment.—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

(f) Eligible beneficiary.—For purposes of this subchapter, the term "eligible beneficiary" means an individual who—

(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

26 U.S.C. § 9704. Liability of assigned operators

(a) Annual premiums.—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium.—For purposes of this chapter—

(1) In general.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium.—The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

(A) the amount determined by dividing—

(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

(ii) the number of such individuals, plus

(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

(3) Adjustments for medicare reductions.—If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

(c) Death benefit premium.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

(d) Unassigned beneficiaries premium.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

(e) Premium accounts; adjustments.—

(1) Accounts.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

(2) Allocations.—

(A) Administrative expenses.—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

(B) Interest.—Interest shall be allocated to the account established for health benefit premiums.

(3) Shortfalls and surpluses.—

(A) In general.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

(B) Exception.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

(C) No authority for increased payments.—Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703(b)(2).

(f) Applicable percentage.—For purposes of this section—

(1) In general.—The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706

to all such operators (determined on the basis of assignments as of October 1, 1993).

(2) Annual adjustments.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

(g) Payment of premiums.—

(1) In general.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

(2) Deductibility.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(h) Information.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Commissioner of Social Security information as to the benefits and covered beneficiaries under the fund, and such other

information as the Secretary may require to compute any premium under this section.

(i) Transition rules.—

(1) 1988 agreement operators.—

(A) 1st year costs.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

(B) Deficits from merged plans.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

(C) Failure.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

(D) Premium reductions.—

(i) 1st year payments.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under

subparagraph (A) by such operator for the plan year beginning February 1, 1993.

(ii) Deficit payments.—In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the "evergreen clause" found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

(iii) Limitation.—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

(iv) Plan years.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

(E) Allocations of contributions and refunds.—Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

(2) 1st plan year.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

(3) Startup costs.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

26 U.S.C. § 9705. Transfers

(a) Transfer of assets from 1950 UMWA Pension Plan.—

(1) In general.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

(A) $70,000,000 on February 1, 1993,

(B) $70,000,000 on October 1, 1993, and

(C) $70,000,000 on October 1, 1994.

(2) Reservation.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

(3) Use of funds.—Amounts transferred to the Combined Fund under paragraph (1) shall—

(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary

premium under section 9704(a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

(4) Tax treatment; validity of transfer.—

(A) No deduction.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

(B) Other tax provisions.—Any transfer pursuant to paragraph (1)—

(i) shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

(5) Treatment of transfer.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines, or penalties of any kind whatsoever.

(b) Transfers from abandoned mine reclamation fund.—

(1) In general.—The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

(2) Use of funds.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

26 U.S.C. § 9706. Assignment of eligible beneficiaries

(a) In general.—For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

* * * *

26 U.S.C. § 9711. Continued obligations of individual employer plans

(a) Coverage of current recipients.—The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

(b) Coverage of eligible recipients.—

(1) In general.—The last signatory operator of any individual who, as of February 1, 1993, is not receiving retiree health benefits under the individual employer plan maintained by the last signatory operator pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes eligible to receive benefits under such plan, provide health benefits coverage to such individual and the individual's eligible beneficiaries which is described in

paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

(2) Coverage.—Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and subject to all the limitations of) the coverage provided by the individual employer plan as of January 1, 1992. Such coverage shall continue for as long as the last signatory operator (and any related person) remains in business.

(c) Joint and several liability of related persons.—Each related person of a last signatory operator to which subsection (a) or (b) applies shall be jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b).

(d) Managed care and cost containment.—The last signatory operator shall not be treated as failing to meet the requirements of subsection (a) or (b) if benefits are provided to eligible beneficiaries under managed care and cost containment rules and procedures described in section 9712(c) or agreed to by the last signatory operator and the United Mine Workers of America.

(e) Treatment of noncovered employees.—The existence, level, and duration of benefits provided to former employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

(f) Eligible beneficiary.—For purposes of this section, the term "eligible beneficiary" means any individual who is eligible for health benefits under a plan described in subsection

(a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

(g) Rules applicable to this part and part II.—For purposes of this part and part II—

(1) Successor.—The term "last signatory operator" shall include a successor in interest of such operator.

(2) Reassignment upon purchase.—If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

26 U.S.C. § 9712. Establishment and coverage of 1992 UMWA Benefit Plan

(a) Creation of plan.—

(1) In general.—As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a).

The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

(2) Treatment of plan.—The 1992 UMWA Benefit Plan shall be—

(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

(b) Coverage requirement.—

(1) In general.—The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

(2) Eligible beneficiary.—For purposes of this section, the term "eligible beneficiary" means an individual who—

(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

(B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

(c) Health benefits.—

(1) In general.—The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

(2) Managed care.—The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

(3) Major elements of rules.—Elements described in this paragraph are—

(A) implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,

(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the

amount of the potential discount varying by geographic region,

(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

(D) utilizing, in the claims payment function "appropriateness of service" protocols under title XVIII of the Social Security Act if more stringent,

(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

(4) Last signatory operators.—The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

(5) Standards of quality.—Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets

the standards of quality adopted by, a medical peer review panel, which has been established—

(A) by the settlors, or

(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

(d) Guarantee of benefits.—

(1) In general.—All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b)(2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992

UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

(2) Adjustments.—The 1992 UMWA Benefit Plan shall provide for—

(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

(3) Additional liability.—Any last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

(4) Joint and several liability.—A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

(5) Deductibility.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(6) 1988 last signatory operator.—For purposes of this section, the term "1988 last signatory operator" means a last signatory operator which is a 1988 agreement operator.

* * * *

Supreme Court, U.S.
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No. 99-12

In the Supreme Court of the United States

UNITY REAL ESTATE COMPANY, ET AL., PETITIONERS

v.

MARTY D. HUDSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, that assign responsibility for funding the health-care benefits of retired coal miners and their dependents to the coal mine operators that previously employed the miners pursuant to collective bargaining agreements that promised the miners health-care benefits for life violate the Due Process or Just Compensation Clauses of the Fifth Amendment.

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v.

MARTY D. HUDSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 178 F.3d 649. The opinion of the district court in the *Unity Real Estate* case (Pet. App. 61a-78a) is reported at 977 F. Supp. 717. The opinion of the district court in the *Barnes & Tucker* case (Pet. App. 79a-95a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1999. The petition for a writ of certiorari was filed on June 28, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, to address a crisis in the funding of two multi-employer welfare benefit plans that paid for the health-care benefits of coal miners, retired miners, and their dependents. Those multi-employer plans, the United Mine Workers of America 1950 Benefit Plan and Trust (1950 Benefit Trust) and the United Mine Workers of America 1974 Benefit Plan and Trust (1974 Benefit Trust), were created and funded through a series of national collective bargaining agreements, known as National Bituminous Coal Wage Agreements (NBCWAs), between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators Association (BCOA). See generally *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 505-509 (1998) (plurality opinion).

Before 1974, a single multi-employer fund was the exclusive source of pension and health-care benefits for UMWA miners, retirees, and their dependents. See *Eastern*, 524 U.S. at 505-506 (plurality opinion). In the 1974 NBCWA, the UMWA and the BCOA agreed to separate that fund into two multi-employer pension funds and two multi-employer welfare benefit funds. Under the 1974 NBCWA, the 1950 Benefit Trust provided health-care benefits to miners who retired before 1976, and the 1974 Benefit Trust provided health-care benefits to both the active work force and miners who retired in 1976 or thereafter. *Id.* at 509 (plurality opinion). Unlike previous agreements, the 1974 NBCWA expressly stated that miners and their spouses would be entitled to health-care benefits for life. *Id.* at 510 (plurality opinion); see also Pet. App. 102a (1974 NBCWA, providing that "[a]ny pensioned

miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a [H]ealth Services card until her death or remarriage"); *In re Chateaugay Corp.*, 53 F.3d 478, 482 (2d Cir.), cert. denied, 516 U.S. 913 (1995).

The structure of the 1950 and 1974 Benefit Trusts was changed in the 1978 NBCWA. In that agreement, employers who were bound by the NBCWA (known as signatory operators) agreed to provide benefits to their active employees and future retirees through individual employer health plans, rather than the 1974 Benefit Trust. The 1974 Benefit Trust was retained to provide health-care benefits to post-1975 "orphaned" retirees, whose last employer had gone out of business. See *Eastern*, 524 U.S. at 510 (plurality opinion). The 1950 Benefit Trust for miners who retired before 1976 (and their dependents) was also retained. See *id.* at 511 (plurality opinion). The 1978 NBCWA, like the 1974 agreement, expressly promised that miners covered by the agreement would receive health-care benefits for life. See *Chateaugay*, 53 F.3d at 482; Pet. App. 122a-123a.[1]

In the 1980s, the financial stability of the 1950 and 1974 Benefit Trusts was plagued by spiraling health-care costs, the phenomenon of coal operators "dumping" their retirees into the 1974 Benefit Trust by terminating their individual welfare benefit plans or leaving the coal business, and judicial decisions maintaining the trusts' beneficiary population without corresponding increases in coal operator contributions. The withdrawal of coal operators from the 1950 and 1974 Benefit

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[1] The 1981 and 1984 NBCWAs had similar express promises of health-care benefits for life. See Pet. App. 141a, 142a, 145a, 146a (1981 NBCWA); 162a, 163a, 166a, 167a (1984 NBCWA).

Trusts forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for not only their own retirees, but also newly "orphaned" retirees whose employers had ceased contributing to the Trusts. Those rising costs, in turn, influenced several still-contributing signatory operators to withdraw from the Trusts, thus further shrinking the trust-fund contribution base. See *Eastern*, 524 U.S. at 511 (plurality opinion). The Trusts' ability to provide health-care benefits was jeopardized, and the issue of retiree health-care benefits contributed to a protracted strike at the Pittston Coal Company. *Ibid.* (plurality opinion).

2. In 1990, the Secretary of Labor established the Advisory Commission on United Mine Workers Retiree Health Benefits (Coal Commission) to examine the financial crisis confronting the Trusts and to recommend solutions. See *Eastern*, 524 U.S. at 511-512 (plurality opinion). As relevant here, the Coal Commission recommended, as one alternative solution, that current and past signatories to the NBCWAs should bear the cost of providing health-care benefits to "orphaned" retirees whose former employers were no longer in the coal business, as well as to their own retirees. See *id.* at 512-513 (plurality opinion). The Coal Act was based in large part on that alternative recommendation by the Coal Commission. See *id.* at 513-514 (plurality opinion); 138 Cong. Rec. 5331 (1992) (statement of Sen. Wofford).

The Coal Act was designed to provide stable financing for the health-care benefits of all retired coal miners and their dependents who were covered by either the 1950 or 1974 Benefit Trust, or by an individual employer plan under the NBCWAs. To that end, the Coal Act creates two new, private multi-employer health-

care benefit trusts. The first new fund, the United Mine Workers of America Combined Benefit Fund (Combined Fund), the trust at issue in *Eastern*, was created by the statutory merger of the 1950 and 1974 United Mine Workers Benefit Trusts. It provides benefits to beneficiaries who were receiving (and were eligible to receive) benefits from those trusts when the Coal Act was enacted. See 26 U.S.C. 9702. Benefits are financed through annual premiums paid by signatory employers that remain in business, or by a "related person" if the employer is no longer in business; the amount of the premiums is determined by the Commissioner of Social Security under a formula established by the Coal Act. 26 U.S.C. 9706(a).

The second new fund, the United Mine Workers of America 1992 Benefit Plan (1992 Plan), is an entirely new entity designed to provide lifetime health-care benefits to individuals who should receive coverage under an individual employer plan but do not. See 26 U.S.C. 9712(b)(2)(B).[2] To provide financing for benefits under the 1992 Plan, the Coal Act assigns responsibility for funding the health-care benefits of a miner and his

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[2] The Coal Act elsewhere requires a mine operator that was providing health-care benefits to a miner or miner's dependents under an individual employer plan maintained under a 1978 or subsequent NBCWA, as of February 1, 1993, to continue to provide such benefits for as long as the operator remains in business. 26 U.S.C. 9711(a). If such an operator goes out of business or does not provide such benefits, a miner eligible to receive benefits from the operator's individual employer plan will receive benefits from the 1992 Plan. See 26 U.S.C. 9712(b)(2)(B). The 1992 Plan also provides health benefits to individuals who, but for the enactment of the Coal Act, would have been eligible to receive benefits under the 1950 or 1974 Benefit Trusts as of February 1993. See 26 U.S.C. 9712(b)(2)(A).

dependents to the signatory employer that most recently employed the miner. See 26 U.S.C. 9712(d).

The Coal Act directs the creation of the Combined Fund and the 1992 Plan as private multi-employer benefit plans and provides for the appointment of the plans' trustees. 26 U.S.C. 9702(a), 9712(a)(1). The Act further provides that the Combined Fund and the 1992 Plan have the same legal status as any other private multi-employer welfare benefit plan under the Employee Retirement Income Security Act of 1974 and the Labor-Management Relations Act of 1947. 26 U.S.C. 9702(a)(3), 9712(a)(2); see 29 U.S.C. 1002(1) and (37); 29 U.S.C. 186(c)(5).

3. Petitioner Unity Real Estate Company was assigned responsibility for the health-care benefits of 74 beneficiaries of the Combined Fund and two beneficiaries of the 1992 Plan. Pet. App. 9a. Those assignments were based upon the miners' employment by Unity or by one of its "related" entities (as defined by the Coal Act, see 26 U.S.C. 9701(c)(2)). Thirty of the miners assigned to Unity had worked for Unity or for a related company for more than ten years, and 13 for more than 15 years; the average duration of the employment of the miners assigned to Unity was approximately ten years. Pet. App. 9a & n.3. One of Unity's related entities, South Union Coal Company (Pennsylvania), operated coal mines from 1923 until its absorption into a Unity subsidiary, and signed the NBCWAs of 1947 through 1961. *Id.* at 8a. It was succeeded in mining operations by South Union Coal Company (West Virginia), a wholly owned subsidiary of Unity, which signed the 1974, 1978, and 1981 NBCWAs. *Ibid.* Another related company, Stewart Coal & Coke Company, operated a coal mine and coke plant and made payments to the UMWA Funds from 1949 to 1958, ceasing when it

ended coal mining operations; its former employees continued to receive benefits from the Funds. *Ibid.* Other related companies signed NBCWAs and paid into benefit Funds throughout the 1960s and 1970s. *Ibid.*[3]

4. Petitioner Barnes & Tucker Company was assigned 1544 Combined Fund beneficiaries and 20 1992 Plan beneficiaries. Pet. App. 9a. Barnes and its subsidiary corporations were engaged in large-scale coal production from 1905 until 1986, when its last mining operation was closed; its last agreement to manage a mine terminated on January 1, 1987. *Ibid.* At the peak of its coal mining operations, Barnes employed approximately 1100 UMWA-represented miners. As a member of the BCOA, Barnes was also a party to the NBCWAs of 1971, 1974, 1978, and 1981, and contributed to the UMWA Funds. *Ibid.* Barnes withdrew from the operators' association prior to the 1984 NBCWA, but it agreed to be bound by the 1984 NBCWA. *Ibid.* Upon the termination of the 1984 NBCWA in 1988, Barnes discontinued its individual employer benefit plan, and its retirees were left to be covered by the 1974 Benefit Plan as "orphaned" beneficiaries. *Ibid.* Since 1986,

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[3] Unity is a corporation owned by the Jamison family, as were the entities related to Unity. The relationships between and among the Jamison family and the various related entities enabled the Jamison family to receive substantial payments, in excess of $230,000, from Unity for promissory notes given by Stewart Coal & Coke. In addition, Unity was able to shelter $288,000 in income from federal income tax because of net operating loss carryover from the bankruptcy of its subsidiary South Union (W. Va.). Pet. App. 8a n.2.

Unity's current net worth is approximately $85,000, its annual gross revenues are approximately $50,000, and as of September 1995, it owed the Combined Fund and 1992 Plan over $440,000 in unpaid premiums. Pet. App. 9a.

Barnes has been involved in leasing and subleasing its coal reserves to third parties, and managing its investment portfolio. *Id.* at 10a.

5. Petitioners filed these actions against the Trustees of the Combined Fund and the 1992 Plan, challenging the constitutionality of the Coal Act under the Due Process and Just Compensation Clauses of the Fifth Amendment. The United States intervened to defend the constitutionality of the Act, pursuant to 28 U.S.C. 2403(a). In 1997, before this Court decided *Eastern*, the district court rejected petitioners' constitutional challenges and granted summary judgment for respondents. Pet. App. 61a-78a (*Unity*), 79a-95a (*Barnes*).

The district court first rejected petitioners' arguments that the application of the Coal Act to them violated substantive due process. It followed several appellate decisions upholding the constitutionality of the Coal Act against due process challenges, Pet. App. 68a-69a, 88a-89a, and concluded that "the Coal Act is rational economic legislation that comports with the substantive requirements of the Due Process Clause," *id.* at 88a. As for petitioners' claims that the Coal Act effected an uncompensated taking, the district court sustained the Act under this Court's three-factor test, set forth in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), for determining whether a regulatory measure gives rise to a taking. The district court noted that the Coal Act does not appropriate any property to governmental use but rather "acts to ensure the stability of a private fund," Pet. App. 75a, 93a; that, as measured by comparing their liabilities under the Act to their commitments under the NBCWAs or to the Benefit Trusts, the assessments upon petitioners are proportional, *id.* at 74a, 91a; and

that, as signatories to NBCWAs that explicitly promised lifetime benefits, Unity, its related companies, and Barnes participated in a system that fostered the miners' legitimate expectation of lifetime benefits and did not have a reasonable expectation of completely avoiding liability for those benefits, *id.* at 77a-78a, 94a.

6. While these cases were pending on appeal to the Third Circuit, a divided Court held in *Eastern Enterprises* v. *Apfel* that the Coal Act was unconstitutional as applied to a coal mine operator that signed NBCWAs in effect between 1947 and 1964, but ceased coal mining operations in 1965. See *Eastern*, 524 U.S. at 516-517 (plurality opinion) (recounting history of Eastern's involvement in the coal business). The Coal Act obligated Eastern to pay premiums to the Combined Fund to cover the health benefits of more than 1000 retired miners (or the dependents of the miners) who had worked for the company before 1966. *Id.* at 517 (plurality opinion). Eastern contended that the Coal Act violated substantive due process as applied to it and effected an unconstitutional taking of its property without just compensation by retroactively creating an obligation to finance the benefits of miners who, when employed by Eastern, had no expectation that they would receive open-ended health-care benefits at Eastern's expense.

The plurality concluded that the application of the Coal Act to Eastern effected an unconstitutional taking without just compensation. See *Eastern*, 524 U.S. at 524-527. Applying the Court's three-factor test for analyzing regulatory taking claims (*id.* at 523-524), the plurality found a constitutional problem as to each factor. In particular, the plurality found it significant that the Coal Act imposed liability on Eastern for lifetime health-care benefits even though Eastern had

withdrawn from the coal industry before any of the NBCWAs had promised lifetime benefits to the miners. See *id.* at 532 (with respect to the burden placed on Eastern, noting that Eastern "had no control over the activities of its former employees subsequent to its departure from the coal industry in 1965"); *ibid.* (with respect to investment-backed expectations, stressing that Eastern never participated in an industry-wide agreement creating expectations of lifetime benefits); *id.* at 532-533 (with respect to the nature of the governmental action at stake, stating that "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised").

Justice Kennedy, concurring in the judgment and dissenting in part, disagreed with the plurality's conclusion that the Coal Act should be analyzed as a taking, see *Eastern*, 524 U.S. at 539-547, but concluded that the application of the Coal Act to Eastern violated "[a]ccepted principles" of substantive due process inhibiting the operation of severely retroactive laws, *id.* at 547-550. Justice Kennedy noted that "the imposition of liability on former employers based on past employment relationships" may be upheld under due process principles as remedial legislation designed to allocate properly the costs of the employer's business. *Id.* at 549. He concluded, however, that the Coal Act did not serve that purpose as applied to Eastern because, although "Eastern was once in the coal business and employed many of the beneficiaries, * * * it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy. * * * [T]he expectation was created by promises and

agreements made long after Eastern left the coal business." *Id.* at 550.

Four Justices dissented, and concluded that the Coal Act, as applied to Eastern, was not unconstitutional under either due process or taking principles. *Eastern*, 524 U.S. at 553-568. The four dissenting Justices agreed with Justice Kennedy that the Coal Act should not be analyzed as a taking at all. *Id.* at 554-557.

7. After this Court's decision in *Eastern*, the court of appeals in this case affirmed the grant of summary judgment to respondents. Pet. App. 1a-60a. In reaching that decision, the court observed that it was "difficult to distill a guiding principle from *Eastern*" because the rationale of Justice Kennedy's concurring opinion (relying on the Due Process Clause) was not a "narrower" ground of decision than the plurality's rationale (based on taking principles). *Id.* at 15a-16a. Given the "splintered nature" (*id.* at 15a) of the decision in *Eastern*, the court of appeals concluded that that decision "mandates judgment for [petitioners] only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." *Id.* at 16a. The court then held that the *Eastern* decision "is not on all fours with [this] case," *id.* at 17a, because petitioners herein signed NBCWAs in 1974 and thereafter, rendering them "factually distinguishable from *Eastern*." *Ibid.*[4]

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[4] Judge Aldisert agreed in a concurring opinion that "the decisive material facts" of the instant case and *Eastern* "bear no similarity" because in *Eastern*, "the company (1) left the coal industry in 1965 and (2) was never a party to the 1974 and later Wage Agreements that first suggested the commitment to lifetime benefits for retirees and family members," whereas petitioners "remained in the coal industry until 1981 and 1984 respectively, and

Those points, in combination with the "five-four vote against the takings claim" in *Eastern*, *ibid.*, led the court to conclude that "due process analysis encompasses the relevant concerns" when evaluating the constitutionality of the Coal Act as applied to petitioners. *Ibid.*[5]

With respect to petitioners' substantive due process claim, the court first considered whether "sufficient evidence exists to support Congress's judgment that post[-]1978 signatories of NBCWAs could justly be charged with responsibility for retirees' health benefits, based on the promises they made to coal miners and on the effects of their departure from the industry on the [1950 and 1974 Benefit Trusts]." Pet. App. 19a. After reviewing the history of the Trusts, including the fact that, "[u]nlike Eastern, * * * [petitioners] at some points in time negotiated for and adhered to the very agreements that established the benefit funds at issue," *id.* at 21a-22a, the court ruled "that Congress could reasonably have reached the conclusions it did about the expectation of lifetime benefits and about the coal companies' responsibility for the situation in which the [1950 and 1974 Benefit Trusts] found themselves after the changes of the 1970s and 1980s," *id.* at 28a. The court rejected petitioners' argument that holding them responsible for their miners' health-care benefits impermissibly obligated them, in effect, to remain in the coal business perpetually, and noted that the Coal Act

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participated in negotiations for the 1974 and later Wage Agreements." Pet. App. 54a-55a.

[5] The court separately considered and rejected petitioners' "categorical takings" challenge to the Coal Act, based on the contention that the application of the Act to petitioners would "entirely destroy[]" their businesses. Pet. App. 17a, 46a-53a. Petitioners do not renew that "categorical takings" claim in this Court.

"merely recognizes that all acts have consequences, and that sometimes it is not permissible for a company simply to walk away, leaving its former employees in the lurch." *Id.* at 23a.

The court also concluded that the duration of the Coal Act's retroactive operation in this case does not render it irrational in violation of due process. Pet. App. 38a. The court noted that the period of retroactivity applicable to petitioners' case is "significantly less extensive" than that in *Eastern*, *ibid.*, but it did not rely solely on the diminished retroactivity in this case, *id.* at 38a-39a. Rather, the court held, based on this Court's previous retroactivity decisions, that "[w]here Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." *Id.* at 40a. Based on that approach, the court found the application of the Coal Act permissible in this case because "workers can be harmed * * * by an employer's failure to live up to a long-term promise that formed part of the worker's reasonable expectations on the job." *Id.* at 40a-41a.

The court distinguished the financial burden imposed by the Coal Act on petitioners (less than $1 million to date for Unity, and about $2.5 million per year for Barnes) from the liability at issue in *Eastern* (over $50 million), and observed that petitioners "are not in the same situation as Eastern Enterprises." Pet. App. 41a. Stating that "proportionality is the proper test of economic impact" to determine whether the retroactive application of a law is permissible, *id.* at 42a, the court found the "necessary proportionality" between the burden imposed on petitioners, on one hand, and, on the other hand, the former coal companies' "conduct that create[d] reasonable expectations about the object of the legislation [and] conduct that create[d] the pro-

blems that impelled the legislature to act." *Id.* at 42a-43a. In particular, the "expectation of lifetime benefits created by contractual language combined with the parties' consistent practices" and "the instability of the pre-Coal Act benefit funding structure to which the former coal companies contributed" provided a sufficient basis for the imposition of liability on petitioners. *Id.* at 43a.

In sum, the court held:

> Congress could reasonably determine that [petitioners], along with other coal operators in similar situations, placed the coal industry retiree benefit funds in jeopardy after creating an expectation of lifetime benefits. Moreover, the actions that created the need for the Coal Act are not so far in the past as to make it fundamentally unjust to impose liability upon [petitioners], because the burden is proportional to their contribution to the problem and the retroactivity is not too excessive.

Pet. App. 54a.

ARGUMENT

1. Petitioners contend (Pet. 14-23) that the obligations imposed on them under the Coal Act to finance the health-care benefits of their former employees (and those employees' dependents) violate the Due Process and Just Compensation Clauses of the Fifth Amendment. They contend, in particular, that the court of appeals' decision conflicts with *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), which held the Coal Act unconstitutional as applied to the coal mine operator who challenged the Act in that case. Those contentions are without merit. Petitioners' situation is fundamentally different from the position of the coal operator

before the Court in *Eastern*, because, unlike that operator, petitioners signed collective bargaining agreements in 1974, 1978, and beyond that promised their employees health-care benefits for life. The decision below therefore creates no inconsistency with *Eastern*.

The result reached by the court of appeals is also correct under well-settled taking and substantive due process principles, and it does not conflict with any decision of any other court of appeals. To the contrary, the only other court of appeals that has considered a constitutional challenge to the Coal Act since *Eastern* by companies that were bound by the 1974 and 1978 NBCWAs rejected that challenge, see *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1253-1258 (D.C. Cir. 1998), and it did so based on a reading of the plurality and concurring opinions in *Eastern* that largely parallels that of the Third Circuit in this case. Further, this Court recently denied review in another case from the District of Columbia Circuit presenting the same challenges to the Coal Act. See *Holland* v. *Robert Coal Co.*, No. 97-5352, 1998 WL 794832 (D.C. Cir. Oct. 16, 1998), cert. denied, 119 S. Ct. 1803 (1999). There is no basis in this case for a different result. Further review is therefore not warranted.

a. Although the Court in *Eastern* did not arrive at a single rationale for finding the Coal Act unconstitutional as applied to Eastern, both opinions supporting the judgment in that case emphasized the fact that Eastern left the coal industry before any collective bargaining agreement gave miners an expectation of lifetime health-care benefits. See 524 U.S. at 530-531, 532, 535-536 (plurality opinion); *id.* at 549-550 (opinion of Kennedy, J.).

This case, by contrast, presents a factual situation in which the coal operators signed NBCWAs promising

their employees lifetime benefits; thus, as the court of appeals concluded, "*Eastern* is not on all fours with [this] case." Pet. App. 17a. The result reached by the Court in *Eastern* therefore does not govern here. To the contrary, as the court of appeals observed, "[b]ecause [petitioners] signed NBCWAs in 1974 and thereafter, they are factually distinguishable from *Eastern Enterprises*. Language in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 supports [that] conclusion." *Ibid.*; see also *Association of Bituminous Contractors* v. *Apfel*, 156 F.3d 1246, 1257 (D.C. Cir. 1998) ("the clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability.").[6]

b. Petitioners' further contention (Pet. 14-17) that the court of appeals failed to apply the "retroactivity principles" supposedly endorsed by five Justices in *Eastern* is without merit. Petitioners submit (Pet. 14) that those principles are that "retroactive employee benefits funding legislation is unconstitutional if it imposes on employers a 'substantial' economic burden, based on conduct 'far in the past,' that is 'unrelated to any commitment that the employers made or to any injury they caused.'" Contrary to petitioners' conten-

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[6] Moreover, while the Coal Act required Eastern to begin paying premiums to the Combined Fund in 1993, even though the company had not contributed to the United Mine Workers Benefit Plans since 1965, the Coal Act requires petitioners to finance the health benefits of retirees who were covered by Unity's related companies until 1981 and by Barnes until the end of 1988. See pp. 6-8, *supra*; 26 U.S.C. 9712(b)(2) and (d)(3); cf. *Eastern*, 524 U.S. at 516 (plurality opinion).

tion, the court of appeals examined each of those factors in the context of the facts of this case and concluded that the retroactive scope of the Act, as applied here, is not beyond Congress's legislative power. Pet. App. 4a.

Thus, the court of appeals, expressly following this Court's decisions in *Eastern* and in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), examined the proportionality of the burden imposed by the Coal Act on petitioners and sustained that burden as permissible, noting that even "a large burden is not unconstitutional if the liability actually imposed is not out of proportion to the claimant's prior experience with the object of the legislation." Pet. App. 42a; see also *Connolly*, 475 U.S. at 226. The court of appeals ruled that petitioners' participation in the creation of miners' reasonable expectations of lifetime benefits under NBCWAs beginning in 1974, and in the establisment of a funding structure vulnerable to the excessive creation of "orphaned" retirees when companies left the industry, provided the requisite proportionality of burden to experience sufficient to sustain application of the Coal Act to these operators. Pet. App. 46a. The imposition of liability on petitioners, therefore, can hardly be considered "unrelated to any commitment that the employers made" (Pet. 14).

The court of appeals also correctly concluded that the extent of retroactivity present in this case is not so extreme as to contravene substantive due process. Pet. App. 39a. The court observed that, whereas the application of the Coal Act to Eastern resulted in at least 27 years' retroactive operation—from passage of the Coal Act in 1992 back to Eastern's exit from the coal industry in 1965–the extent of retroactivity at issue in this case is much less, only four years in the case of Barnes. *Ibid.* The court of appeals further noted that this Court

has held that "Congress may retroactively bar employers from giving their employees vested pensions in multiemployer plans and then leaving those plans to collapse." *Id.* at 40a. In contrast to Eastern, petitioners here participated in the creation of a reasonable expectation of lifetime benefits and left the benefit plans in a condition vulnerable to collapse. Accordingly, the periods of retroactivity applicable to the conduct of petitioners survive constitutional scrutiny.

Finally, the court of appeals properly found that the Coal Act was an appropriate congressional response to commitments participated in by petitioners, and was designed to remedy injuries caused by petitioners and similarly acting companies, which withdrew from the coal industry leaving "orphaned" miners and dependents without provision for adequate funding to meet the expectation of lifetime benefits. Petitioners' reliance upon *Eastern* to counter the court of appeals' conclusions in this regard is wholly misplaced. Pet. 17. The injuries that the Coal Act is intended to remedy are not physical harms suffered in "employment in coal mines," *ibid.*; rather, as the court of appeals observed, they are the harms caused by "dumping" retirees on the Benefit Funds, whose funding structures were vulnerable to such behavior. Pet. App. 46a.

2. Petitioners contend (Pet. 24-27) that the court of appeals incorrectly applied *Marks* v. *United States*, 430 U.S. 188 (1977), by failing to give controlling effect to the points of agreement between the plurality opinion and Justice Kennedy's opinion in *Eastern*, and by giving controlling effect to the points of agreement between Justice Kennedy and the dissenting Justices in that case. That contention is without merit.

Marks addresses the situation where a concurring opinion in this Court reaches the same result as that

reached by a plurality of the Justices, but on narrower grounds. In that situation, a lower court should follow the reasoning of the concurring opinion, because the lower court may conclude that a majority of this Court agrees with the narrower position reached by the concurrence. 430 U.S. at 193. To the extent that *Marks* provides any guidance here, it supports the court of appeals' rejection of petitioners' due process challenge. Even though the plurality and concurrence in *Eastern* analyzed that case under different legal frameworks, those opinions agreed on the constitutional significance of a particular fact, namely, that Eastern left the coal industry before 1974, when the NBCWAs began expressly stating that retired miners would receive health benefits for life. As we have explained, both the plurality and Justice Kennedy concluded that the crucial constitutional problem in *Eastern* was the Coal Act's application to an operator that had never signed a wage agreement promising lifetime benefits, and both found that situation distinguishable from the one where an operator had signed such an agreement. See pp. 9-10, *supra*. The court of appeals properly focused on that point of agreement between the plurality and Justice Kennedy in *Eastern* to reject petitioners' due process claim.

Petitioners' contention (Pet. 26) that the court of appeals improperly created a *Marks* majority out of Justice Kennedy's concurrence and the dissent in *Eastern* to reject their taking claim is also incorrect. That argument overlooks the reliance of both the plurality in *Eastern* and the court of appeals in this case on *Connolly* (including the three-part taking analysis of *Connolly*) in evaluating the constitutionality of the Coal Act as applied to petitioners. See *Eastern*, 524 U.S. at 529-532; Pet. App. 12a-14a, 22a, 26a, 29a, 40a, 42a-43a,

44a, 53a. Moreover, although the court of appeals analyzed this case principally under the rubric of substantive due process, it observed that "[t]o the extent that *Eastern* embodies principles capable of broader application, * * * due process analysis encompasses the relevant concerns." *Id.* at 17a. Thus, rather than fashioning the *Eastern* dissent into "the law of the land," as petitioners contend, Pet. 26, the court of appeals effectively applied the analytical scheme of the plurality in *Eastern* to the facts of this case. For the reasons given above, petitioners' claims fail even under the reasoning of the plurality opinion in *Eastern*, which emphasized that Eastern—unlike petitioners herein and other coal companies that signed the 1974 and later NBCWAs--never contributed towards any reasonable expectation of lifetime health benefits on the part of coal miners. The plurality opinion and Justice Kennedy's concurrence therefore form a majority rationale sufficient to reject petitioners' taking claim, and it is not necessary to rely on the dissenting opinion in *Eastern* (although it is also at least doubtful that *Marks* even addresses a situation such as the explicit agreement of the four dissenting Justices in *Eastern* with a concurring Justice's rejection of a particular constitutional claim).

3. Finally, petitioners contend that lower courts are divided about the elements of a taking claim outside the context of the Coal Act, Pet. 27-28, and that the "parameters for due process challenges" to regulatory legislation are uncertain, Pet. 28-29. Those contentions provide no basis for review in this case. The plurality and concurring opinions in *Eastern* identified the same critical characteristics that distinguished the operators that signed NBCWAs in 1974 and afterwards from those that did not, and both opinions found the connec-

tion of the latter group of operators to miners' expectation of lifetime benefits and the financial instability of the funds too attenuated to sustain the Act as applied to those operators. In view of that articulation of general agreement on the principles governing the constitutionality of the Coal Act in particular—principles that were followed by the court of appeals in this case and in the D.C. Circuit's decision in *Association of Bituminous Contractors*, *supra*—there is no basis for further review in a Coal Act case in order to address issues that might arise in *other* contexts in the future.

Petitioners' contentions about the other cases they cite are in any event without merit. Petitioners argue that the First Circuit, in *Parella* v. *Retirement Board of the Rhode Island Employees' Retirement System*, 173 F.3d 46 (1999), improperly relied on the concurrence and dissent in *Eastern* to conclude that a taking challenge will lie only when a "specific" property interest has been taken. In *Parella*, the court considered whether the plaintiff had any property right at all before conducting a taking analysis, and concluded on the facts of that case that the plaintiffs had a mere "expectancy interest" not protected as "property" under the Just Compensation Clause. See *id.* at 58-59. The *Parella* court did not conclude (as Justice Kennedy and the dissenting Justices would have held in *Eastern*) that the imposition of financial liability under a regulatory statute like the Coal Act, which imposes liability among private parties, is necessarily not a "taking." The *Parella* decision is therefore remote from this case. In *Central States, Southeast & Southwest Areas Pension Fund* v. *Midwest Motor Express, Inc.*, 181 F.3d 799 (7th Cir. 1999), petition for cert. pending, No. 99-420 (filed Sept. 7, 1999), the court of appeals followed the path of the plurality opinion in

Eastern and examined legislation challenged as a taking under the well-settled three-factor test set forth in *Connolly*, and observed that "*Eastern Enterprises* does not modify this traditional approach or suggest a different test." *Id.* at 808. In *Vermont Assembly of Home Health Agencies, Inc.* v. *Shalala*, 18 F. Supp. 2d 355 (D. Vt. 1998), the court assumed the existence of a property interest at stake, see *id.* at 369. None of those decisions reflects any confusion regarding the elements of a takings claim.

As for the "parameters for due process challenges" (Pet. 28), petitioners incorrectly suggest that the Court's emphasis in *Eastern* on the fact that retroactivity is "generally disfavored" (Pet. 29) constitutes a significant departure from the Court's previous substantive due process decisions according a heavy presumption of constitutionality to legislation (including retroactive legislation) that adjusts the burdens and benefits of economic life. To the contrary, the plurality opinion in *Eastern* emphasized the Court's longstanding "concerns about using the Due Process Clause to invalidate economic legislation," 524 U.S. at 537, and avoided resting its decision on the Due Process Clause. Justice Kennedy's concurrence did rely on due process principles, but that opinion did not discard the well-settled presumption of constitutionality for regulatory statutes; rather, Justice Kennedy found that presumption rebutted on the particular facts of the case in *Eastern*, which he considered to be a "rare instance[]" of "egregious circumstances." *Id.* at 550. For the reasons we have given, this case presents no comparable circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

UNITY REAL ESTATE COMPANY, *et al.*,
Petitioners,

vs.

MARTY D. HUDSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593 (1992) 9
Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980) 9
Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419 (1992) 9

REPLY BRIEF FOR PETITIONERS

In the petition for certiorari (Pet. 14-23), petitioners demonstrated that the decision below, in upholding a retroactive application of the Coal Act based on employee "expectations" unrelated to, inconsistent with, and vastly broader than any past employer commitments, conflicts with this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Petitioners further demonstrated (Pet. 23-27) that the decision below, in limiting the retroactivity principles endorsed by five Justices in *Eastern* to the facts of that case, conflicts with the rules for construing divided Supreme Court opinions set forth in *Marks v. United States*, 430 U.S. 188 (1977). Finally, petitioners demonstrated (Pet. 27-30) that the refusal of some lower courts to follow these principles has created significant uncertainty about the extent of protection provided by the Takings Clause and the Due Process Clause against the operation of retroactive economic statutes.

In response, respondents contend that the decision below is consistent both with *Eastern* (U.S. Opp. 14-18; Trustees' Opp. 18-25) and with *Marks* (U.S. Opp. 18-20) because the post-1974 NBCWAs at issue here, unlike the pre-1974 NBCWAs directly at issue in *Eastern*, created an assertedly "reasonable expectation" that employees would receive lifetime health benefits. However, respondents do not dispute that the plain language of the post-1974 NBCWAs repeatedly restricted all promised benefits to the term of each agreement. Instead, like the court of appeals, respondents insist that expectations must be sharply distinguished from promises — a position itself inconsistent with *Eastern's* holding that employee expectations, if unrelated to past employer promises, cannot justify the imposition of significant and severely retroactive liabilities.

Alternatively, the trustees contend (Trustees' Opp. 16-18, 27-28) that the decision below need not be consistent with *Eastern* because, under *Marks*, the retroactivity rules endorsed by five Justices in *Eastern* are not binding on the lower courts.

That is plainly incorrect, and this Court should grant review to prevent its decisions from being so eviscerated.

1. As explained in the petition for certiorari (Pet. 8-9, 14), five Justices in *Eastern* explicitly agreed that retroactive economic legislation is unconstitutional if it imposes liability that is (1) substantial in amount, (2) based on conduct far in the past, (3) unrelated to any past commitment made by the burdened party, and (4) unrelated to any past injury caused by that party. *See* 524 U.S. at 537 (plurality); *id.* at 549-50 (concurrence). As further explained (Pet. 15-22), that rule governs this case, because the post-1974 NBCWAs at issue here, like the pre-1974 NBCWAs at issue in *Eastern*, neither promised nor created any "reasonable expectation" that miners would receive lifetime health benefits.

Respondents repeatedly contend that the post-1974 NBCWAs did create a "reasonable expectation" of lifetime health benefits. Respondents invoke this alleged expectation to argue that the retroactive liabilities at issue are closely related to past promises and injuries (U.S. Opp. 18, Trustees' Opp. 21), and thus are constitutionally "proportiona[l]" in both their amount (U.S. Opp. 17, Trustees' Opp. 26-27) and degree of retroactivity (U.S. Opp. 17-18, Trustees' Opp. 25). Similarly, this allegedly "reasonable expectation" of lifetime benefits underlies respondents' rhetoric about some employers "dumping" their commitments onto others (U.S. Opp. 3, Trustees' Opp. 5, 9, 23, 25), as well as their contention that petitioners can fairly be held responsible for funding decisions made under successor NBCWAs to which they were not parties (Trustees' Opp. 22-23). However, respondents do not attempt to relate the alleged "expectation" of lifetime health benefits to the controlling terms of the post-1974 NBCWAs. On the contrary, they insist, as did the court of appeals, on a sharp distinction between the "'contract'" and the "'reasonable

expectations that might have been created by the contract.'" Trustees' Opp. 21 (quoting Pet. App. 27a).[1]

Respondents' attempt to divorce employee "expectations" from past employer promises conflicts with *Eastern*. In that case, respondents argued that the Coal Act was constitutional as applied to signatories of the pre-1974 NBCWAs because those agreements, having been repeatedly renewed for decades, created an "expectation" that health benefits "would continue" indefinitely. *See* 524 U.S. at 535 (plurality). This Court rejected that argument. In reasoning squarely embraced by five Justices, the Court held that "the question is not whether miners had an *expectation* of lifetime benefits" (*id.* (emphasis added)), but whether the retroactive Coal Act liability, which purported to vindicate that expectation, was "unrelated to any *commitment* that the employers made" prior to the statutory enactment. *Id.* at 537 (emphasis added); *see id.* at 549-50 (concurrence). The liability imposed by the Coal Act is "unrelated to any commitment" made in the post-1974 NBCWAs because those agreements, like the pre-1974 NBCWAs at issue

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[1] Respondents offer no serious contention that the retroactive liabilities imposed by the Coal Act can be justified independently of the allegedly "reasonable expectation" of lifetime health benefits. Although the trustees spend pages attacking a categorical takings argument not urged here by petitioners (Trustees' Opp. 25-27; *see* U.S. Opp. 12 n.5), respondents do not contend that the retroactive liabilities imposed on petitioners are insubstantial. Moreover, although respondents note that the degree of retroactivity at issue here is less severe than the 30-year reachback at issue in *Eastern* (U.S. Opp. 17, Trustees' Opp. 24-25), they do not seriously argue that the eleven- and eight-year reachbacks at issue (or, as respondents miscalculate, the eight- and four-year reachbacks) can be justified as "short and limited periods required by the practicalities of producing national legislation," *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981) (per curiam). Finally, although the government contends that the Coal Act is "designed to remedy injuries caused by petitioners" (U.S. Opp. 18), the only "injury" it can point to is the frustration of an alleged "expectation" of lifetime health benefits.

in *Eastern*, explicitly limited all promised benefits to the term of each agreement. As explained in the petition for certiorari (Pet. 3-5, 16-17), at least four NBCWA provisions incorporated such limitations: Article XX(c) limited the "benefits provided" to "the term of this Agreement" (Pet. App. 116a-17a, 135a-36a, 156a-57a); Article XX(d) limited "[c]ontributions by [e]mployers" to "the life of this Agreement" (Pet. App. 99a-101a, 118a-21a, 137a-39a, 158a-60a); Article XX(h) limited the "benefits provided," and the guarantee of full funding, to "the term of this Agreement" (Pet. App. 121a, 140a, 161a); and Article III of the incorporated plan documents warned that "benefits may be suspended or reduced" after the underlying NBCWA had expired (Pet. App. 110a-13a, 131a-32a, 152a-53a, 173a-74a). Respondents do not even acknowledge, much less attempt to explain away, any of these emphatically clear limitations on the "commitment[s]" underlying the alleged "expectation" of lifetime health benefits.[2]

Respondents also attempt (U.S. Opp. 2-3, Trustees' Opp. 4, 21) to derive an assertedly "reasonable expectation" of lifetime benefits from statements that miners would retain a health insurance card "for life" or "until death." That analysis also conflicts with *Eastern*, in which five Justices ignored "isolated statements" inconsistent with the operative contractual terms. *See* 524 U.S. at 535 (plurality); *id.* at 549-50 (concurrence). The statements cited by respondents all appeared in a "General

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[2] The trustees briefly suggest (Trustees' Opp. 21) that the post-1974 NBCWAs promised, but then did not fund, lifetime health benefits. The NBCWAs cannot bear that construction: Articles XX(c) and XX(h) of each NBCWA, and Article III of each incorporated trust document, expressly limited employee "benefits" to the term of each agreement, just as Articles XX(d) and XX(h) of each NBCWA limited employer "contributions" to the term of each agreement. Accordingly, the cases upholding the imposition of retroactive liability for underfunded pension benefits, *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984), are plainly inapposite here, just as they were in *Eastern*.

Description" or "Summary" of benefits (Pet. App. 101a-08a, 121a-30a, 140a-51a, 161a-72a) attached to the post-1974 NBCWAs. However, the NBCWAs themselves explicitly qualified the General Description "in the event of any inconsistencies" (Pet. App. 133a, 154a); the General Description by its terms was "qualified in its entirety by" the NBCWAs (Pet. App. 121a, 140a, 161a); and, in any event, the General Description by its terms stated that "benefits are guaranteed" only "during the term of this Agreement" (Pet. App. 129a, 149a, 171a). As Judge Aldisert noted, "[t]o suggest that the clear language limiting benefits to the term of the Wage Agreement is trumped by the 'lifetime' health card is a stretch." Pet. App 58a (concurring in the judgment).[3]

Respondents further contend (U.S. Opp. 16, 19-20, Trustees' Opp. 18-20, 22 n.6) that *Eastern* itself authoritatively construed the post-1974 NBCWAs to have promised lifetime health benefits. However, those agreements were not at issue in *Eastern*, were only partially included in the record in that case, and were not the subject of any adversarial debate.[4]

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[3] The retention of a "health services card" ensured that miners would not lose health benefits (1) because they already had received benefits for a fixed number of years, *see UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 565-67 (1982); (2) because their employer had become delinquent in contributions to the UMWA funds, *see Blankenship v. Boyle*, 329 F. Supp. 1089, 1104 (D.D.C. 1971); or (3) because they had recently switched jobs, *see Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992). These considerations in no way suggest that miners had been promised or could reasonably expect benefits even after an NBCWA had expired, and even if no successor agreement was in place.

[4] The employer in *Eastern*, seeking to present the narrowest possible ground for invalidating the Coal Act as applied in that case, affirmatively embraced the mistaken proposition that the post-1974 NBCWAs had promised lifetime health benefits. *See, e.g.*, Petition for Certiorari at 18-19, *Eastern Enters. v. Chater* (No. 97-42) ("It was only beginning in 1974, almost a decade after Eastern's departure from the industry, that successor wage agreements guaranteed lifetime retiree health benefits . . . .").

Accordingly, this Court explicitly reserved the question whether the pre-1974 NBCWAs (purportedly enforced through 26 U.S.C. § 9706(a)(3)) are materially different from the post-1974 NBCWAs (purportedly enforced through § 9706(a)(1) and (2)). *See* 524 U.S. at 515, 538 (plurality); *id.* at 549-50 (concurrence).[5]

Finally, the trustees, but not the government, assert many other insubstantial objections. First, they assert (Trustees' Opp. 16 n.5) that petitioners did not preserve their current argument below. In fact, petitioners did so repeatedly. *See, e.g.*, Letter Brief of Appellants at 2-5, 8-11 (Aug. 20, 1998); Joint Supplemental Submission of Appellants and Amici at 2-19 (Dec. 23, 1998). The trustees also argue (Trustees' Opp. 20) that Congress "is not fettered by the terms of private contracts." That proposition is true where prospective legislation is at issue. Even where retroactive legislation is at issue, it is also true if only an insubstantial burden is at issue, if the degree of retroactivity is short, or if the legislation remedies injuries caused by the regulated party. However, if none of these limiting principles is present, and if the retroactive liability is also unrelated to the employer's past contractual or other commitments, *Eastern* makes clear that the legislation is unconstitutional. *See* 524 U.S. at 537 (plurality); *id* at 549-50 (concurrence). Similarly inapposite is the trustees' statement (Trustees' Opp. 24) that a long reachback period "alone is insufficient" to establish unconstitutionality; petitioners make no such contention. Finally, the trustees suggest that the Coal

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[5] The passages cited by respondents only confirm this Court's careful agnosticism on that question. *See, e.g.*, 524 U.S. at 530 (plurality) (post-1974 NBCWAs "first *suggest* an industry commitment to the funding of lifetime health benefits" (emphasis added)); *id.* at 535 ("Not until 1974 . . . *could* lifetime medical benefits under the multiemployer agreement have been viewed as promised." (emphasis added)); *id.* at 535-36 (post-1974 NBCWAs made "a guarantee of defined benefits, *at least* for the life of the agreements" (emphasis added)).

Act might not be "retrospective at all" (*id.*). That suggestion is frivolous, as even a cursory examination of *Eastern* makes clear.[6]

2. As explained in the petition for certiorari (Pet. 24-27), the decision below conflicts with *Marks* and *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992), because it refused to give effect to the points of agreement between the *Eastern* plurality and concurrence, and did give effect to the points of agreement between the *Eastern* concurrence and dissent. The government does not attempt to defend the court of appeals' principal *Marks* holding (Pet. App. 16a-17a) that opinions resting respectively on the Takings Clause and the Due Process Clause cannot form a *Marks* majority, regardless of their extent of agreement on the specific rule at issue. Instead, the government acknowledges that the *Eastern* plurality and concurrence "form a

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[6] Respondents make no attempt to defend the Coal Act either on the ground that the coal industry is heavily regulated, as Chief Judge Becker suggested (Pet. App. 25a-26a), or on the ground that courts must defer to Congress's demonstrably incorrect contract constructions, as Judge Aldisert suggested (Pet. App. 55a-59a). As explained in the petition for certiorari (Pet. 21-22), these rationales also conflict with *Eastern*. The trustees briefly assert (Trustees' Opp. 6 n.3) that the Coal Commission examined the post-1974 NBCWAs "in detail." Like the briefs in opposition, however, the Coal Commission Report (Supp. App. 389-91) does not even acknowledge, much less discuss, *any* of the controlling NBCWA provisions. That is hardly surprising because, despite the trustees' suggestion to the contrary, the Coal Commission did not represent the interests of *former* mining companies such as petitioners. Former NBCWA signatories who "continued to operate in the Coal industry" (Trustees' Opp. 6 n.3) were subject to Evergreen Clause liability in any event, *see UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993); Pet. 5 n.2, and thus had every incentive to conjure up another theory (based on the alleged promise of lifetime benefits) for extending liability to former NBCWA signatories who, like petitioners, had already left the industry.

majority rationale" (U.S. Opp. 19-20), but contends that, under that rationale, the Coal Act is constitutional as applied to companies that signed post-1974 NBCWAs. That position rests on the premise that *Eastern* construed the post-1974 NBCWAs to have promised "health benefits for life" (U.S. Opp. 19). As explained above, that premise is mistaken.

The trustees do repeatedly argue (Trustees' Opp. 16-18, 27-28) that takings and due process opinions may never form a *Marks* majority. However, the trustees err in reasoning that to recognize common legal principles in such opinions is to create "'generalized claims of unconstitutionality.'" *Id.* at 18, quoting *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1253-54 (D.C. Cir. 1998) ("*ABC*"). As explained in the petition for certiorari (Pet. 24-25), any agreed-upon legal rules are themselves a "common denominator," *King*, 950 F.2d at 781, and the trustees offer no sound reason why, as a matter of logic or precedent, it should matter whether those rules derive from more general takings or due process principles.

The trustees further err in contending (Trustees' Opp. 28-29) that the decision below is consistent with *King* on the question whether a concurrence and a dissent can form a *Marks* majority. In this case, the court of appeals foreclosed all takings scrutiny of the Coal Act because, under the *Eastern* concurrence and dissent, "[t]here are five votes against the plurality's Takings Clause analysis." Pet. App. 15a-16a. In *King*, by contrast, the D.C. Circuit specifically held that "we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority." 950 F.2d at 783.

Finally, the trustees err in contending (Trustees' Opp. 29) that *City of Erie v. Pap's A.M.* (No. 98-1161) is irrelevant because the *Marks* issues in *Pap's* arise in the context of a First Amendment challenge to a nude dancing ordinance. Before even addressing that question on the merits, the petitioners in *Pap's* contend as a threshold matter that this Court's

fragmented decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), is controlling under *Marks*. *See* Brief for Petitioners at 11-18 (Aug. 16, 1999), *City of Erie v. Pap's A.M.* (No. 98-1161). This Court's resolution of that question should elucidate *Marks* as much as it does *Barnes*.

For these reasons, the Court should grant review to determine whether *Eastern* controls only "substantially identical" cases involving pre-1974 NBCWAs, as the court of appeals held in this case (Pet. App. 16a-17a); whether *Eastern* constitutes only a "specific result" in a single case, as the D.C. Circuit absurdly held in *ABC* (156 F.3d at 1254-55); or whether, as at least one other court already has recognized, *Eastern* "stands for a clear principle: a liability that is severely retroactive, disruptive of settled expectations and wholly divorced from a party's experience may not constitutionally be imposed. We draw that conclusion from the language offered both by the plurality and by the concurrence." *Maine Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372, 378-79 (1999) (citing *Marks* and *King*). At a minimum, the Court should hold this case pending resolution of the *Marks* issues in *Pap's*.[7]

3. As explained in the petition for certiorari (Pet. 27-29), the refusal of some lower courts to follow *Eastern* has created

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[7] The trustees err in stating (Trustees' Opp. 28) that there is no "persistent or intractable problem" in interpreting and applying *Marks*. Courts have struggled mightily with this problem. *See, e.g.*, *King*, 950 F.2d at 779-85; *Planned Parenthood v. Casey*, 947 F.2d 682, 691-98 (3d Cir. 1991), *aff'd in part and rev'd in part*, 505 U.S. 833 (1992); *Pap's A.M. v. City of Erie*, 719 A.2d 273, 276-79 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (1999); *see generally* Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593 (1992); Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419 (1992); Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980). Moreover, given the steadily increasing number of plurality opinions (Pet. 24 n.22), this confusion will surely accelerate.

significant uncertainty regarding the extent to which the takings and due process clauses afford protection against retroactive economic statutes. The government concedes (U.S. Opp. 21-22) that the Seventh Circuit has continued to entertain regulatory takings claims even where the statute at issue, like the Coal Act, imposes only general monetary liabilities. *See Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 808-09 (7th Cir. 1999) (MPPAA case), *cert. pending* (No. 99-420). However, the First Circuit, like the court of appeals below (Pet. App. 15a-17a), has held that the Takings Clause is entirely inapplicable in this context. *See Parrella v. Retirement Bd. of the Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 58-59 & n.10 (1st Cir. 1999). Moreover, respondents cannot seriously dispute that the lynchpin of the controlling *Eastern* opinions, that "[r]etroactivity is generally disfavored," 524 U.S. at 532 (plurality), and that, "for centuries our law has harbored a singular distrust of retroactive statutes," *id.* at 547 (concurrence), is precisely the opposite of the otherwise controlling principle that even retroactive statutes "are clothed in a formidable presumption of constitutionality," *Eastern Enters. v. Chater*, 110 F.3d 150, 155 (1st Cir. 1997) (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)), *rev'd sub nom. Eastern Enters. v. Apfel*, 524 U.S. 498 (1998).[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] The trustees concede (Trustees' Opp. 2-3, 14-15) the breadth and importance of the questions presented.

Respectfully submitted,

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In the Supreme Court of the United States

UNITY REAL ESTATE COMPANY and
BARNES & TUCKER COMPANY,
Petitioners,
v.
MARTY D. HUDSON, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES AND UMWA 1992 BENEFIT PLAN AND ITS TRUSTEES

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QUESTION PRESENTED

Beginning in 1974, the National Bituminous Coal Wage Agreements ("NBCWAs") explicitly referred to lifetime health coverage for retired coal miners and their dependents. The question presented in this case is whether the court of appeals correctly concluded that the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, does not violate the Due Process or Takings Clause of the Fifth Amendment as applied to Barnes & Tucker, a coal company that voluntarily agreed to and signed the NBCWAs of 1974, 1978, 1981, and 1984, and Unity, a company that through its coal mining subsidiary voluntarily agreed to and signed the NBCWAs of 1974, 1978, and 1981.

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BRIEF IN OPPOSITION FOR RESPONDENTS UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES AND UMWA 1992 BENEFIT PLAN AND ITS TRUSTEES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 178 F.3d 649. The opinion of the district court in *Unity* (Pet. App. 61a-78a) is reported at 977 F. Supp. 717. The opinion of the district court in *Barnes & Tucker* (Pet. App. 79a-95a) is not reported. An earlier opinion of the district court in *Unity* is reported at 889 F. Supp. 818.

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* and 30 U.S.C. § 1232(h) (the "Coal Act"), which was enacted as Title XIX, Subtitle C, of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56. The petition does not reproduce the statute in full. Among other things, it omits the prefatory provisions of the Coal Act that set forth Congress' findings and declaration of policy. Accordingly, the portions of the statute not reproduced by petitioners are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), a divided Court held one provision of the Coal Act unconstitutional as applied to the specific circumstances of the petitioner in that case. The plurality and concurring opinions in *Eastern* ruled that Section 9706(a)(3) of the statute, 26 U.S.C. § 9706(a)(3), is unconstitutional as applied to a company that left the coal business in 1965, and thus did not sign a 1974 or later National Bituminous Coal Wage Agreement ("NBCWA"), which referred

expressly to lifetime health benefits for coal industry retirees and their dependents. In sharp contrast to Eastern, petitioner Barnes & Tucker Company ("B&T") did not leave the coal business in 1965 but remained in the industry and signed the NBCWAs of 1974, 1978, 1981, and 1984, each of which helped to foster an expectation of lifetime retiree health coverage. Similarly, petitioner Unity Real Estate Company ("Unity"), through one of its statutory "related persons," remained in the coal business and was signatory to the NBCWAs of 1974, 1978, and 1981. Petitioners are thus readily distinguishable from Eastern.

Contrary to petitioners' characterization, this case is not an effort to apply *Eastern*, but rather an attempt to eviscerate the entire statutory health case system established by Congress in the Coal Act. Through that statute, Congress sought to remedy a funding crisis in the preexisting contractual multiemployer health care plans. Recognizing the inability of collective bargaining to deal with employers that had contributed to the creation of the problem but that were no longer mining coal or participating in the collective bargaining process, Congress sought by statute to spread liability broadly among various responsible parties.

Following the decision in *Eastern*, the Commissioner of Social Security notified approximately one hundred operators that were similarly situated to Eastern (in that none of them and none of their related persons had signed a 1974 or later NBCWA) that their Combined Fund beneficiary assignments were void in light of *Eastern*, and that no further payment would be required of them under the Coal Act. Petitioners, not fitting that description, received no such notice.

If petitioners' arguments here were accepted, coal operators that signed 1974 and later NBCWAs would no longer be required to provide health benefits to nearly

70,000 retired miners and their dependents, and the Coal Act would be totally dismantled. Petitioners' all-out assault on Congress' decision in the Coal Act to impose liability on those entities, such as B&T and Unity, that signed collective bargaining agreements that explicitly referred to health coverage for life, benefitted from the multiemployer health care system, and then abandoned their retirees and dependents in the multiemployer funds is not supported by *Eastern* or by any decision before or after this Court's ruling.

A. History And Structure Of The Coal Act

The several opinions in *Eastern* addressed at some length the historical background of the Coal Act.[1] We summarize only those aspects of that background that are relevant here.

1. History Of The Coal Act

a. National Bituminous Coal Wage Agreements

Since 1946, retiree health benefits in the coal industry have been provided through a series of multiemployer health plans established in collective bargaining. From 1950 through 1974, health benefits (and pension benefits as well) were provided through a single multiemployer plan known as the UMWA 1950 Welfare and Retirement Fund ("1950 W&R Fund"). Following the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), the collective bargaining parties, the United Mine Workers of America ("UMWA") and the Bitumin-

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[1] Numerous court of appeals decisions, both before and after *Eastern*, have addressed the same history. *See, e.g., Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) (*"ABC"*); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996); *In re Blue Diamond Coal Co. (Blue Diamond Coal Co. v. Shalala)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *In re Chateaugay Corp. (LTV Steel Co. v. Shalala)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995).

ous Coal Operators' Association, Inc. ("BCOA"), divided the 1950 W&R Fund into four separate plans. This was accomplished in the 1974 NBCWA. *See* Pet. App. 96a-113a.

Two of the four new plans, the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan, provided health benefits, and the other two provided pension benefits. The 1974 NBCWA explicitly provided that miners and their dependents would retain their health services cards—which gave them access to health benefits through the UMWA Funds—"for life." Pet. App. 5a-6a. The 1974 NBCWA in fact contains thirteen separate references to the retention of health services cards "for life" or "until death." Pet. App. 30a. Subsequent NBCWAs, including the NBCWAs of 1978, 1981, and 1984, contain similar repeated references to the retention of health services cards "for life" or "until death' or to an "entitle[ment] to receive health benefits until death." Pet. App. 30a-33a.

In 1978, the UMWA and BCOA restructured the industry's contractual health care system to address employer concerns that the multiemployer approach was unraveling as fewer companies elected to participate in the multiemployer plans and an increasing burden was placed on a shrinking base of signatory operators. First, for miners leaving covered service in the coal industry on or after January 1, 1976, the primary responsibility for retiree health coverage was shifted from the UMWA multiemployer system to the individual coal company that employed the miner in question. The 1974 Benefit Plan was retained as an "orphan" plan through which benefits would be provided to retirees whose former employer had gone out of business. Pet. App. 6a. Second, the employers signing the 1978 and later NBCWAs agreed to the "guarantee clause" that appears in Article XX(h) of the collective bargaining agreement. Pet. App. 6a, 121a. Under the guarantee clause, the signatory employers com-

mitted to make the contributions necessary to maintain the contractually specified benefits throughout the term of the agreement. Third, the employers that signed the 1978 and later NBCWAs also agreed to the so-called "evergreen clause." Under the evergreen clause, all of the signatory employers agreed that they would continue to contribute to the collectively bargained plans for as long as subsequent NBCWAs required such contributions, even if a particular employer did not sign such subsequent NBCWAs. Pet. App. 6a. These contractual features were perpetuated in subsequent collective bargaining agreements, *i.e.*, the NBCWAs of 1981, 1984, and 1988.

b. *The Crisis That Threatened The Multiemployer Plans And Their Beneficiaries, And The Efforts To Resolve It*

As health care costs increased, coal operators began exiting the coal industry and "dumping" their retirees into the UMWA Plans, where their benefits would be funded by the remaining signatory operators. As the number of coal operators contributing to the UMWA Plans decreased, fewer and fewer operators were left to carry the burden of rapidly rising health care costs, not only for their own retirees but also for thousands of retirees with whom none of the remaining contributing operators had ever had any employment relationship. Pet. App. 6a.

In 1989, as the situation worsened, the UMWA engaged in a ten-month labor dispute against the Pittston Coal Company, which was resolved only after Secretary of Labor Dole intervened and appointed a mediator. The eventual settlement provided, *inter alia*, for the creation of the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"), an industry-wide commission charged with the task of analyzing the retiree health care crisis and recommending solutions. Pet. App. 7a.

The November 5, 1990 Coal Commission report explained that the collective bargaining process—limited as it was to companies still mining coal—was inadequate to provide a long-term solution. Accordingly, the Commission recommended that Congress enact legislation to address the problem. Supp. App. 350-51, 417-28.[2] After two years of deliberations on the Coal Commission's report and recommendations, Congress enacted the Coal Act.[3]

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[2] "Supp. App." refers to the Supplemental Appendix filed by the non-government appellees in the court of appeals. A copy of the Supplemental Appendix has been lodged with the Clerk of this Court.

[3] Petitioners wrongly claim (Pet. 6) that the Coal Commission report "did not discuss any contractual terms of the pre- or post-1974 NBCWAs . . . ." To the contrary, the Coal Commission report examined the coverage of the 1950 and 1974 Benefit Plans in detail. Supp. App. 389-91. Petitioners also claim erroneously (Pet. 6 n.4) that former NBCWA signatories "were not represented on the Coal Commission," and thus could not advance their position that former signatories of expired NBCWAs had, and should have, no continuing obligation to provide benefits to miners. Petitioners' assertion is false.

One of the Commissioners was Richard M. Holsten, the former President and Chairman of Pittsburg and Midway Coal Mining Company, a former NBCWA signatory that refused to sign the 1988 NBCWA, continued to operate in the coal industry, declined to make continuing contributions to the UMWA Funds notwithstanding its evergreen clause obligations, and ultimately had to be compelled to make those payments by the courts in an action brought by the Trustees of the UMWA Funds. *See In re UMWA Employee Benefit Plans Litigation*, 782 F. Supp. 658 (D.D.C. 1992), *aff'd sub nom. UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993). Not only did Commissioner Holsten play an important role in the development of the Coal Commission report, he submitted a separate written statement, which is reproduced at pages 81-83 of the report, concluding that "the present deficits can be eliminated . . . [by] involving present signatory companies only." Supp. App. 442. Moreover, former NBCWA signatories had every opportunity to attend public meetings and submit written statements to the Coal Commission, and they in fact did so. Supp. App. 476-79. August

2. *The Structure Of The Coal Act*

In the Coal Act, Congress provided that eligible beneficiaries under the statute would receive health coverage either from their former employers' individual employer plans (the continuation of which the statute required) or from one of two new trust funds to be created in accordance with the statute. Both of these new funds, the United Mine Workers of America Combined Benefit Fund ("Combined Fund") and the United Mine Workers of America 1992 Benefit Plan ("1992 Plan"), and their Trustees are respondents in this Court.

Under the Coal Act, the 1950 and 1974 UMWA Benefit Plans were merged into the Combined Fund as of February 1, 1993. 26 U.S.C. § 9702. The Combined Fund provides health and death benefits to coal industry retirees and their dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Plans. *Id.* at § 9703(a), (b)(1), (e), (f). The 1992 Plan was created by the Coal Act to provide benefits to eligible retirees and their dependents who are not beneficiaries of the Combined Fund, who retired prior to October 1, 1994, and who are not receiving health care coverage directly from their former employers. *Id.* at § 9712.

The coal operators that voluntarily participated in the UMWA Funds pursuant to the terms of their collective bargaining agreements with the UMWA, including B&T

Keller of Bellaire Corporation (which later unsuccessfully challenged the Coal Act in a case in which it was represented by one of the current counsel for Unity and B&T, *Bellaire Corp. v. Chater*, 995 F. Supp. 125 (D.D.C. 1997)) appeared in person before the Coal Commission, and several representatives of former NBCWA signatories (including Mr. Smock (whose law firm represents Unity and B&T in this Court), Mr. Laurent (a former member of Mr. Smock's firm who represented Unity and B&T before the district court and court of appeals), Mr. Dials, Mr. Keller, and Mr. Miercort) submitted written statements to the Coal Commission.

and the coal operators affiliated with Unity, are required to finance the benefits provided by the Combined Fund. Coal Act premiums are based on the number of Combined Fund beneficiaries that have been assigned to the operators by the Secretary of Health and Human Services (now, the Commissioner of Social Security) under Section 9706 of the Act. With respect to the 1992 Plan, the Coal Act requires the last signatory operator to which each 1992 Plan beneficiary is attributable to pay a monthly per beneficiary premium to cover the cost of that beneficiary's health care. 26 U.S.C. § 9712(d)(1)(B), (3), Because the last signatory operators for many 1992 Plan beneficiaries are no longer in business and therefore do not pay monthly per beneficiary premiums, the remaining funds necessary to provide benefits to beneficiaries of the 1992 Plan are provided through an annual prefunding premium assessed against operators that were signatory to the 1988 NBCWA. *Id.* at § 9712(d)(1)(A).

B. B&T's Involvement In The Coal Industry, And The Assignment Of Coal Act Beneficiaries To B&T

B&T seeks to minimize its extensive involvement in the coal industry by describing only its recent activities. Pet. 10. B&T thus attempts to ignore the fact that it was engaged in large-scale coal production from approximately 1905 to 1986. At the peak of its coal mining operations from the 1970s to the 1980s, B&T employed approximately 1100 UMWA represented miners. Pet. App. 9a. As a member of BCOA, B&T was signatory to the 1971, 1974, 1978, and 1981 NBCWAs. After withdrawing from the BCOA, B&T agreed to be bound by the 1984 NBCWA on a "me-too" basis. *Id.*

B&T also contributed significantly to the developing financial crisis of the UMWA Benefit Plans. At the expiration of the 1984 NBCWA, B&T discontinued its individual employer health plan and dumped its retirees into the 1974 Benefit Plan, to receive benefits paid for

by the remaining contributing employers. B&T's actions in that regard, the resulting significant increase in the beneficiary population of the 1974 Benefit Plan, and the financial impact of such additional beneficiaries on the UMWA multiemployer health care system, are addressed in *UMWA v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). *Nobel* involved retirees from B&T and six other large coal industry employers that discontinued retiree health benefits even though the employers remained in business. The district court, affirmed by the court of appeals, held that the retirees (together with their spouses and dependents) could turn to the 1974 Benefit Plan for their health care coverage even though the former employers were still in business. Virtually overnight, this added some 2000 new beneficiaries to the 1974 Benefit Plan, all of whom were to receive benefits paid for by coal operators with whom they had no employment relationship, while B&T and the other six former employers contributed nothing. This sequence of events directly contributed to the financial crisis that led to the Coal Act. Pet. App. 22a.

Under the Coal Act, the Secretary assigned B&T approximately 1250 Combined Fund beneficiaries as of February 1, 1993, the day on which the Combined Fund began providing health coverage under the statute. Supp. App. 510. Mortality has since reduced this number considerably. B&T is also the last signatory operator to which approximately 20 beneficiaries of the 1992 Plan are attributable. Supp. App. 518-19.

C. Unity's Involvement In The Coal Industry, And The Assignment Of Coal Act Beneficiaries To Unity

By claiming that Unity is "a family business that owns a small commercial building and a parking lot," Unity also attempts to distance itself from its extensive involvement in the coal industry. Pet. 10. Unity is covered by the

Coal Act as a "related person" to several companies that had mined coal for decades using hundreds of UMWA miners. These companies were ultimately absorbed into Unity. Pet. App. 8a. Among these companies were South Union-PA and South Union-WV. South Union-PA had mined coal since 1923, and had signed the 1947 NBCWA, the 1950 NBCWA, and the amendments thereto through 1961, when it ceased its mining activities. South Union-WV was incorporated in 1974 as a wholly-owned subsidiary of Unity, and mined coal from 1975 through 1981 using UMWA-represented miners. South Union-WV signed the 1974, 1978, and 1981 NBCWAs, although a bankruptcy court later allowed it to repudiate the 1981 NBCWA. Pet. App. 8a. After South Union-WV's bankruptcy, Unity's president wrote to the 1974 Benefit Plan and confirmed that South Union-WV's eligible retirees and their dependents would receive health coverage from the 1974 Plan, even though South Union-WV was out of business and no longer contributing to the UMWA Funds. Pet. App. 66a.

Under the Coal Act, the Secretary assigned Unity 78 Combined Fund beneficiaries as of February 1, 1993, based on Unity's relationship to coal industry employers that are no longer in existence. Supp. App. 495. In addition, Unity is responsible for the health benefits of two 1992 Plan beneficiaries, for whom a coal industry employer related to Unity is the last signatory operator. Supp. App. 498-501.

D. Proceedings In The Courts Below

B&T and Unity filed complaints against the Trustees of the Combined Fund and the Trustees of the 1992 Plan challenging the constitutionality of the Coal Act. The United States intervened in both cases to defend the validity of the statute.

B&T and Unity moved for preliminary injunctions to prevent the Trustees from enforcing the Coal Act against

them during the pendency of the cases. B&T voluntarily withdrew its motion for a preliminary injunction before the district court acted on it. After receiving recommendations from the magistrate judge (1994 U.S. Dist. LEXIS 20403, 1995 U.S. Dist. LEXIS 8585), the district court granted Unity's motion for a preliminary injunction. 889 F. Supp. 818 (1995). The court rejected Unity's Due Process Clause argument but granted the requested interim relief on Takings Clause grounds. In March 1997, after numerous courts, including the Third Circuit, had sustained the validity of the Coal Act (*see, e.g., Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996)), the district court granted the Trustees' and the government's motions for summary judgment and denied Unity's and B&T's motions for summary judgment. Pet. App. 61a-95a.

The court of appeals heard argument on the appeals by Unity and B&T while *Eastern* was under submission in this Court. At the oral argument, the court instructed the parties to submit letter memoranda on the significance of *Eastern* once that case was decided. Following the submission of those memoranda, the court heard further oral argument and directed the parties to file post-argument briefs. The court of appeals then affirmed. Pet. App. 1a-60a.

In sustaining the Coal Act as applied to Unity and B&T, the court of appeals held that *Eastern* is distinguishable on its facts and does not support petitioners' position. Relying on both the plurality and concurring opinions in *Eastern* (*see* 118 S. Ct. at 2139-40, 2150, 2152 (plurality); 2159 (Kennedy, J., concurring in the judgment and dissenting in part)), the court ruled that *Eastern* is distinguishable because, whereas Eastern did not sign a 1974 or later NBCWA, B&T signed the 1974, 1978, 1981, and 1984 NBCWAs, and Unity, through its statutory related person (the wholly owned subsidiary South Union-WV), signed the 1974, 1978, and 1981

NBCWAs. In the court's words, "[b]ecause the plaintiffs signed NBCWAs in 1974 and thereafter, they are factually distinguishable from Eastern Enterprises. Language in the plurality and concurrence suggesting that expectations fundamentally changed after 1974 supports our conclusion." Pet. App. 17a. The court held that the factual distinction between Eastern and petitioners "compels the conclusion that *Eastern* is not on all fours with the case before us." *Id.*

After an extensive review of the parties' arguments, the court concluded (Pet. App. 24a-25a) that Congress acted within its authority:

> We cannot say that it was irrational for Congress to charge the miners' former employers with the costs of their benefits, when the miners qualified for lifetime benefits from the Trustees because of their former employment . . . and the employers' departure from the industry contributed to the problem confronting the Trustees.

The court explained that, contrary to petitioners' contention, the constitutionality of the Coal Act involves an issue different from the question of what the collective bargaining agreements required (*id.* at 27a-28a):

> [T]he contracts did not provide for the payments mandated by the Coal Act. If the contracts had so provided, the Coal Act would have been unnecessary . . . . But this is not an action brought for contractual violations. We focus our attention instead on what conclusions Congress might rationally draw about the parties' relations and expectations, and what it might fairly do to close the gap between the contractual obligations of the coal companies and the Funds' actual liabilities.

After considering not only the relevant contractual provisions but also their historical context, the Coal Commission report, prior judicial decisions, and this Court's opinions in *Eastern*, the court ruled that it would "defer

to Congress's judgments on the nature of the problem before it, including judgments about causation and reasonable expectations." *Id.* at 38a. In the court's words,

> we conclude that Congress could reasonably have reached the conclusions it did about the expectation of lifetime benefits and about the coal companies' responsibility for the situation in which the Funds found themselves after the changes of the 1970s and 1980s.

Id. at 28a.

Having sustained the congressional assessment of the nature and source of the problem, the court turned to the means chosen by Congress to address it. The court held that "the Coal Act's retroactivity does not render it irrational in violation of due process." Pet. App. 38a. The court noted that the retroactivity in this case is "significantly less extensive than that in *Eastern*" (*id.*) and less extensive than that previously sustained under other federal statutes such as the Black Lung Benefits Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (*id.* at 39a n.12). The court emphasized, however, that it did not rely solely on the length of retroactivity but instead "assess[ed] the relationship of the retroactively imposed liability to the governmental interests asserted in its defense." *Id.* at 39a-40a. As a result of petitioners' participation in the 1974 and later NBCWAs, the court held, petitioners "created reasonable expectations about benefits and established a funding structure vulnerable to 'dumping' retirees when companies left the industry." *Id.* at 46a. Because petitioners thus contributed both to "the instability of the pre-Coal Act benefit funding structure" and the beneficiaries' "expectation of lifetime benefits", the court said (*id.* at 43a), Congress reasonably could conclude that retroactive legislation was warranted to address the problem.

ARGUMENT

The court of apeals' decision is correct and further review is not warranted. The decision is fully consistent with this Court's ruling in *Eastern* and accurately reflects the limited nature of that ruling. The court applied the well-established legal standard governing substantive due process challenges to economic legislation, and it did so with proper regard for the retroactive aspect of the statute at issue.

In sustaining the validity of the Coal Act as applied to post-1974 NBCWA signatories, the court of appeals reached the same result as the D.C. Circuit, the first post-*Eastern* court to address the constitutionality of the statute as applied to such employers. *ABC*, 156 F.3d at 1253-58. *See also Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999) ("the considerations bearing upon whether Congress acted rationally in imposing retroactive liability on the NBCWA signatory in Eastern Enterprises are different than those relating to the rationality of imposing liability on members of a control group of a 1978 or subsequent benefit plan signatory"); *Holland v. Robert Coal Co.*, 172 F.3d 919, 1998 WL 794832 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1803 (1999); *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161 (3d Cir. 1999), *cert. pending*, No. 99-262 (filed Aug. 12, 1999). There is no conflict among the circuits.

If petitioners' argument were accepted, the entire congressional scheme for protecting retiree health benefits in the coal industry would be defeated.[4] *Every* signatory employer (including signatories to the 1988 NBCWA, the collective bargaining agreement in effect when the Coal Act was passed) could make the same argument as peti-

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[4] Petitioners themselves acknowledge that "the vast majority of companies subject to the Coal Act are signatories of post-1974 NBCWAs." Pet. 23.

tioners, namely, that the contribution obligations to which they agreed by contract were limited to the terms of the contracts they signed and that therefore Congress' effort to impose a new statutory obligation covering the period *after* the term of those agreements is invalid. As the court of appeals correctly recognized, such an outcome would be irreconcilable not only with several decisions upholding the Coal Act after *Eastern* but also with the reasoning of the plurality and the concurrence in *Eastern* itself and with this Court's own precedents establishing that the legislative authority of Congress is not confined by the terms of private contracts. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935).

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *EASTERN*

Petitioners' argument that the court of appeals improperly refused to follow *Eastern* is incorrect. First, the "retroactivity principles" that petitioners attempt to derive from the plurality and concurring opinions in *Eastern* do not represent the holding of the Court and do not have some independent constitutional status apart from the two separate Fifth Amendment provisions on which the Members of the Court who voted in favor of *Eastern* relied. Second, petitioners, who signed the 1974, 1978, 1981, and (in B&T's case) 1984 NBCWAs, are not similarly situated to Eastern, which left the coal industry in 1965 and did not sign an NBCWA after 1964. Third, petitioners' argument that they have no contractual obligation to provide benefits to Coal Act beneficiaries falls short, because Congress' legislative authority is not limited by contractually binding promises. Fourth, the court of appeals properly rejected petitioners' claims of unconstitutional "retroactivity." Fifth, petitioners' argument that the

Coal Act unconstitutionally takes their property is without merit and is not supported by the decision in *Eastern*.

A. Petitioners Misstate The Holding Of *Eastern*

Although petitioners acknowledge, as they must, that there was no opinion for the Court in *Eastern*, they nevertheless contend that the Court "proposed a four-part test for assessing the constitutionality of retroactive employee benefits funding legislation" and that Justice Kennedy and the plurality relied on the same "retroactivity principles." Pet. 8, 9, 14. Applying this alleged "four-part test" to themselves, petitioners conclude that the Coal Act is "plainly unconstitutional" as applied to B&T and Unity. Pet. 15-17. This reasoning is faulty for several reasons.[5]

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[5] The argument now adopted by petitioners was not previously advanced by them, but was made to the court of appeals by *amici curiae* LTV Corporation and North American Coal Company. Pet. App. 16a. Petitioners—now represented by, among others, counsel for LTV and North American in the court below—have elected to de-emphasize their own prior arguments and to feature instead the arguments favored by LTV and North American.

LTV and North American failed long ago in their own attacks on the constitutionality of the Coal Act. *In re Chateaugay*, 53 F.3d 478 (2d Cir.); *Bellaire*, 995 F. Supp. 125 (Bellaire is a North American subsidiary). After this Court's decision in *Eastern*, LTV and North American have sought to use other cases as vehicles to repeat their general assault against the Coal Act as applied to post-1974 NBCWA signatories. In each of these cases, LTV and North American have sought to convert narrower attacks on the statute into broader challenges akin to those that LTV and North American unsuccessfully pursued on their own behalf in the past. Both the Third Circuit in this case and the D.C. Circuit in *ABC* have rejected these efforts. Pet. App. 16a; *ABC*, 156 F.3d at 1257-58. Earlier this year, the Court denied a petition for a writ of certiorari filed by Robert Coal Company, which advanced similar arguments to those set forth by LTV and North American as *amici* in *Unity* and *ABC*. 119 S. Ct. 1803 (1999). Counsel of record for Robert Coal in this Court (but not in the district court or the court of appeals) was the same counsel who represented LTV and North American as *amici curiae* in *Unity* and *ABC*. It appears, therefore, that this case and others are being used as a front for larger entities, such as LTV and North American, to destroy the Coal Act and shed themselves of liability for the health care of their former employees.

To begin with, neither the plurality opinion nor the concurrence purported to create any new "test" for determining whether economic legislation such as the Coal Act is "unconstitutional." Instead, they applied well-established, but different, constitutional principles to the specific case before the Court. Applying "the three factors that traditionally have informed our regulatory takings analysis," the plurality concluded that the Coal Act violated the Takings Clause as applied to Eastern. 118 S. Ct. at 2149 (plurality). Justice Kennedy rejected the plurality's reliance on the Takings Clause but decided that the Coal Act as applied to Eastern violated "accepted principles" of this Court's due process jurisprudence. *Id.* at 2158 (Kennedy, J., concurring in the judgment and dissenting in part). The plurality declined to reach the due process question and acknowledged that the Court "has expressed concerns about using the Due Process Clause to invalidate economic legislation." *Id.* at 2153 (plurality).

Petitioners dismiss the diagreement between the plurality and concurring opinions as a disagreement "only on 'doctrinal categorization' " and declare that the plurality and Justice Kennedy " 'agreed on legal principles.' " Pet. 23 (quoting law review note). Petitioners avoid any argument addressed to either the Takings Clause or the Due Process Clause and amalgamate the two distinct concepts by asserting that their "test" demonstrates that the Coal Act is in some generalized way "unconstitutional" as applied. Pet. 14.

But this is not the way courts determine the constitutionality of statutes. The "retroactivity principles" that petitioners purport to extract from the plurality and concurring opinions in *Eastern* have no independent constitutional status; there is no constitutional right, for example, to be free from retroactive statutes or from the imposition of "substantial" liability. For this very reason, the court of appeals rejected an identical argument offered by

LTV and North American below. Pet. App. 16a. The D.C. Circuit in *ABC* similarly rejected the claim that *Eastern* requires that the Coal Act be held generally "unconstitutional" on the basis of this extra-constitutional "test":

> We begin our analysis with a bedrock principle of constitutional adjudication. . . . The Constitution prohibits certain governmental action through specific clauses. . . . Courts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted under specific constitutional clauses. . . . We certainly will not apply a takings analysis to resolve a due process challenge or engage in a free-wheeling, non-textual examination of the "constitutionality" of the Coal Act.

ABC, 156 F.3d at 1253-54.

B. Petitioners Are Not Similarly Situated To Eastern

Even if petitioners had properly presented claims under the Due Process Clause and the Takings Clause rather than their generalized claim of "unconstitutionality," *Eastern* would not support petitioners' position. The lynchpin of the plurality and concurring opinions in *Eastern* was that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. 118 S. Ct. at 2142-43 (plurality), 2159 (Kennedy, J., concurring in the judgment and dissenting in part). B&T, by contrast, actively mined coal until 1986, and signed the 1974, 1978, 1981, and 1984 NBCWAs, and Unity's subsidiary, South Union-WV, actively mined coal until 1981, and signed the 1974, 1978, and 1981 NBCWAs.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. The plurality stated, for example,

that "[t]he 1974 NBCWA . . . amend[ed] previous medical benefits to provide a Health Services card for retired miners until their death, and to their widows until their death or remarriage." 118 S. Ct. at 2139-40. Similarly, the plurality distinguished the NBCWAs that Eastern had signed from those that came later:

> [W]hile Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978, or subsequent NBCWA's. *It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.*

Id. at 2150 (emphasis added); *see also id.* at 2153 ("There is no doubt that many coal miners sacrificed their health on behalf of this country's industrial development, *and we do not dispute that some members of the industry promised lifetime medical benefits to miners and their dependents during the 1970's.*") (emphasis added).

Justice Kennedy likewise concluded that Eastern

> was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation *was created by promises and agreements made long after Eastern left the coal business.*

Id. at 2159 (emphasis added). The four dissenting Justices in *Eastern* took the view that, while implicit promises were made, and legitimate expectations created, long before the 1974 NBCWA, those commitments were made explicit in the 1974 and later NBCWAs. *Id.* at 2161 (Stevens, J., dissenting) ("their implicit agreement was made explicit in 1974").

The common theme among the various opinions in *Eastern* is that the 1974, 1978, and subsequent NBCWAs

created in retired coal miners a reasonable expectation of lifetime health benefits. As stated by the D.C. Circuit in *ABC*, "[t]he clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." 156 F.3d at 1257; Pet. App. 23a-25a. Thus, petitioners, who signed the 1974, 1978, 1981, and 1984 NBCWAs and thereby helped to foster an expectation of lifetime health coverage, cannot avoid their Coal Act liabilities by claiming that they are similarly situated to Eastern.

C. Petitioners' Argument Is Based On A False Premise; Congress' Legislative Authority Is Not Limited By Contractually Binding Promises

Petitioners' primary argument for avoiding Coal Act liability is that they have no contractual obligation to provide benefits to Coal Act beneficiaries, since the employer contribution obligations imposed by the 1974 and later NBCWAs were limited to the term of each contract. Pet. 16-17. For this reason, petitioners claim that the retroactive Coal Act liabilities imposed on them are "vastly broader" than any of their past promises or commitments. *Id.* This argument is fundamentally flawed, because Congress, in exercising its legislative power, is not fettered by the terms of private contracts. *See Connolly*, 475 U.S. at 223-24 ("Contracts, however express, cannot fetter the constitutional authority of Congress") (quoting *Norman*, 294 U.S. at 307-08). Indeed, if there were a requirement that legislation merely track contractual promises, there would be little impetus to enact legislation. As the court of appeals recognized, "[t]he *Eastern* plurality did not reject the *Connolly* principle that government may do more than require private parties to live up to their contracts." Pet. App. 44a.

The rationality of Congress' decision to provide for the stable financing of health care benefits for coal industry retirees does not depend on a finding of a contractually binding "promise" or "commitment," however those words may be defined. The legislative purpose is a legitimate governmental objective that Congress is authorized to pursue in the exercise of its Article I powers. The only question is whether Congress has acted rationally and non-arbitrarily in imposing liability on the very employers that created, participated in, and benefitted from the UMWA multiemployer health care system, that signed collective bargaining agreements that explicitly referred to health coverage for life, and that formerly employed retirees who were continuing to receive benefits from the multiemployer system at the time that Congress acted. As summarized by the court of appeals, "we think that explicit promises are not necessary in order to justify congressional action. The question is what reasonable expectations the coal companies' actions created." Pet. App. 26a.

The NBCWAs signed by petitioners in 1974, 1978, and 1981 and by B&T in 1984 referred repeatedly to health care coverage "for life" or "until death," even though the funding mechanism was tied to the term of each successive NBCWA. Pet. App. 30a-31a. Petitioners' efforts to deny the significance of the contractual references to lifetime health coverage are based on "a strained reading of the terms 'for life' and 'until death,' which refer to persons (the miners and their dependents) and not to the continuing existence of an NBCWA." *Id.* at 31a. As the court of appeals correctly observed, all of petitioners' arguments "have the same fundamental weakness": they "go to the contract and not to the reasonable expectations that might have been created by the contract." *Id.* at 27a. This conclusion is entirely consistent with the view expressed by all members of the Court in *Eastern* that the 1974 and subsequent NBCWAs expressly referred to the

provision of lifetime health benefits. 118 S. Ct. at 2139-40, 2150, 2153 (plurality), 2159 (Kennedy, J., concurring in the judgment and dissenting in part), 2161 (Stevens, J., dissenting).[6]

Petitioners also contend that the Coal Act cannot be upheld on the ground that petitioners' actions "helped to create the financial crisis" in the UMWA plans. Pet. 20. Petitioners ignore their extensive history in the coal industry, which lasted for many decades and did not end until more than 20 years after Eastern left the coal industry. Unity mined coal for 58 years and B&T for 80. Pet. App. 37a. As the court of appeals commented:

> Coal companies such as Unity and B&T received benefits from the steady expansion of health and

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[6] Petitioners attempt to support their position by citing language in *Davon*, 75 F.3d at 1128, that "[n]othing radical happened in 1974." Pet. 14. But *Davon* is not at all helpful to petitioners' argument. *Davon*, like several other decisions before *Eastern*, sustained the Coal Act even as applied to pre-1974 signatories. It was in the context of rejecting an argument that pre-1974 NBCWA signatories should be relieved of Coal Act liability that the *Davon* court made the statement on which petitioners now seek to rely. *Davon* found the proposed distinction between pre-1974 signatories and signatories to 1974 and later agreements "wholly unpersuasive." 75 F.3d at 1128. The court explained:

> Each consecutive NBCWA, including those after 1974, accomplished the same end—to provide benefits to miners until the next NBCWA—using the same means—funding on a multi-employer basis. *Nothing radical happened in 1974.* As we stated in the due process context, the promise of lifetime benefits was not an unforeseeable inclusion in an NBCWA; every coal operator that participated in the multi-employer plans contributed directly to the retirees' legitimate expectations of lifetime benefits.

Id. (emphasis added). The five Justices who voted in favor of Eastern did not accept this reasoning; they concluded that something quite significant occurred in 1974 and thereafter, because it was in those years (and not before) that the collective bargaining agreements expressly referred to lifetime health benefits. It was this very fact that led the plurality and concurring Justices to rule in favor of Eastern, which did not sign an NBCWA after 1964.

> retirement benefits, including wage concessions and union agreement to mechanization, during that period. *Their long-term participation made it particularly understandable that miners would expect that the companies' adherence to promises of lifetime benefits in the NBCWAs would be honored.*

Id. (emphasis added).

Moreover, unlike Eastern, Unity and B&T, as BCOA members, participated in the negotiations that created the post-1978 funding structure, and then dumped their retirees into the UMWA Fund without paying for their continuing health benefits. In Justice Kennedy's concurrence in *Eastern*, he stressed that Eastern, as a pre-1974 signatory, was not responsible for creating either the expectation of lifetime benefits or "for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy." 118 S. Ct. at 2159. The same clearly cannot be said for either B&T or Unity. It is undisputed that B&T was a large employer whose departure from the industry added more than a thousand beneficiaries to the Funds as so-called "orphans" who had been abandoned by their former employer—B&T. B&T's dumping of beneficiaries into the Funds clearly helped create the financial crisis that ultimately led to the Coal Act. *Nobel*, 720 F. Supp. 1169; Pet. App. 22a, 25a. Similarly, when Unity's subsidiary declared bankruptcy, it informed the Funds that it was no longer in business and would no longer provide health benefits for its retirees, thus forcing the 1974 Fund to take responsibility for those retirees without any funding from Unity or any members of its corporate family. Pet. App. 22a.

D. The Court Of Appeals Properly Rejected Petitioners' Claims Of Unconstitutional "Retroactivity"

Petitioners contend that, as applied to them, the Coal Act is impermissibly retroactive. The argument is defective in several respects.

First, although the point is undisputed, petitioners nowhere acknowledge that the Coal Act provides benefits purely on a prospective basis and does not require funding for *any* health care received before the statute's enactment. To the extent the statute is retrospective at all, it is retrospective only in the sense that other federal statutes, such as the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901 *et seq.*, and CERCLA, 42 U.S.C. §§ 9601 *et seq.*, are also retrospective: In establishing the existence and extent of current and future liabilities, those laws look in part to events that occurred in the past. But, as the decisions sustaining the Black Lung Benefits Act and CERCLA show, *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), that fact alone is insufficient to establish that such laws are invalid, even where the coal industry employment or polluting discharge in question occurred *decades* before the statutes' enactment.

Second, petitioners exaggerate the extent of the Coal Act's "retroactivity." By focusing on the beginning rather than the end of the terms of the last coal industry collective bargaining agreements that they signed, petitioners assert that the Coal Act involves eight (rather than four) years of retroactivity as applied to B&T and eleven (rather than eight) years of retroactivity as applied to Unity. On this dubious reasoning, the statute would involve nearly five years of retroactivity even with respect to those operators that were NBCWA signatories at the time the Coal Act was passed. That is so because the then-current NBCWA was the 1988 NBCWA, the term of which began on February 1, 1988, well over four and a half years before the statute's enactment. This point

confirms that, unlike this Court's decision in *Eastern*, petitioners seek to destroy the entire Coal Act.

In any event, even using petitioners' questionable arithmetic, the retroactivity of the Coal Act as applied to petitioners does not remotely approach the degree of retroactivity that five Justices found offensive in *Eastern*. According to the plurality and concurring opinions, the employer in that case left the coal industry in 1965, more than 27 years before the Coal Act was passed. As the court of appeals here concluded, "[t]he retroactivity is significantly less extensive than that in *Eastern*." Pet. App. 38a.

Perhaps most important, petitioners' simplistic counting of years neglects altogether the close relationship among the liability imposed by the Coal Act, the collective bargaining agreements signed by petitioners (with their frequent references to lifetime health care), petitioners' own conduct in "dumping" their retirees into the contractual multiemployer plans (where for years they received benefits paid for entirely by other employers), and the legitimate governmental interests supporting the challenged legislation. In the court of appeals' words, "[w]here Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." Pet. App. 40a.

E. Petitioners' Argument That The Coal Act Unconstitutionally Takes Their Property Is Without Merit

To the extent that petitioners continue to pursue any argument under the Takings Clause, they focus primarily on a comparison between the amount of their Coal Act obligations and the amount of their current assets and income. Claiming that the Coal Act effectively will put them out of business, petitioners apparently contend that

the statute is invalid for that reason alone. Pet. 15.[7] As the court of appeals observed, however, five Justices in *Eastern* concluded that the Takings Clause does not provide the proper basis for review of economic regulatory legislation like the Coal Act. Pet. App. 15a, 17a; *see also Eastern*, 118 S. Ct. at 2154-58 (Kennedy, J. concurring in the judgment and dissenting in part); 2161-64 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). Even putting that fact aside, petitioners' position is without merit. The constitutionality of a federal statute does not depend on the vagaries of a particular corporation's current economic performance, future prospects, or past disposition of assets.

As the court of appeals correctly observed, this Court "has repeatedly rejected the argument that a tax—even a tax on a small set of businesses—may violate due process or constitute a taking simply because it may force some of the regulated entities out of business . . . ." Pet. App. 48a, citing *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 373-74 (1974). The constitutionality of a statutory assessment "should not depend on the happenstance of the financial condition of the assessed [entity] at the time of the assessment." *Branch v. United States*, 69 F.3d 1571, 1577 (Fed. Cir. 1995) (no taking occurred where losses by an insolvent bank led to assessments against sister banks that exceeded those banks' net worth), *cert. denied*, 519 U.S. 810 (1996). Any other rule, as the court of appeals properly recognized, "would

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[7] At least in the case of B&T, the prophecies of doom have been overstated for some time. B&T has been asserting for nearly six years that it is on the verge of bankruptcy as a result of its Coal Act obligations. *See* B&T's Mem. of Law in Support of Its Mot. for Prelim. Inj. (filed Nov. 12, 1993), at 14-15 ("[B&T's] payments of the sums to be demanded under the Coal Act will consume all of its cash and other available assets within approximately 16 months, at which time [B&T] will be bankrupt . . . [and] will not be able to remain a viable business"). The error in B&T's prediction currently stands at four and a half years, and it grows daily.

open up a Pandora's Box that would throw into question every economic regulation imaginable." Pet. App. 51a-52a. The proper inquiry concerns not the size of a liability as a percentage of current assets or income but the proportionality of the assessment to the "legitimate obligations society may impose on individual entities," given all the circumstances involved. *Id.* at 53a. The court of appeals correctly concluded that the Coal Act satisfies this proportionality requirement.

II. THE COURT OF APPEALS CORRECTLY INTERPRETED *MARKS v. UNITED STATES*, AND PETITIONERS' OTHER PROPOSED GROUNDS FOR REVIEW ARE INSUBSTANTIAL

In a last-ditch effort to manufacture a legal error warranting this Court's attention, petitioners critique the court of appeals' application of this Court's decision in *Marks v. United States*, 430 U.S. 188, 193 (1977). Pet. 24-27. Petitioners' criticisms are unjustified. *Marks* states that, where there is no opinion for the Court, the holding of a case may be viewed as "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotation and citation omitted). But this approach is feasible only where "one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992); *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994). Where the various opinions adopt distinct approaches and none can be said to be a subset of another, "no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the Court." *Rappa*, 18 F.3d at 1058; *see also King*, 950 F.2d at 782.

The court of appeals here correctly observed that "Justice Kennedy's substantive due process reasoning is

not a 'narrower' ground that we might take to constitute the controlling holding." Pet. App. 16a. The D.C. Circuit came to precisely the same conclusion. *ABC*, 156 F.3d at 1255 ("as should be obvious, Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's taking analysis."). In such circumstances, only the result in the case before this Court is binding, and only in substantially identical cases. Pet. App. 16a; *ABC*, 156 F.3d at 1254-55.

Petitioners' claim of a conflict between this case and the D.C. Circuit's decision in *King v. Palmer*, 950 F.2d at 783, is not justified. The statement quoted in isolation by petitioners (Pet. 26) about whether the court in *King* was "free" to combine the concurrence and dissent in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987), to form a *Marks* majority can be understood only in the context of the subject at issue in *King* and the various opinions in *Delaware Valley*. As the D.C. Circuit's opinion explained, just as Justice O'Connor's concurring opinion could not fairly be said to be a logical subset of the plurality opinion, so the concurrence was also different from the dissent, and it was not at all clear whether and in what circumstances Justice O'Connor and the dissenting Justices would agree that a risk enhancement should be awarded for an attorney's contingency fee. 950 F.2d at 782-84. It was in these circumstances that the D.C. Circuit made the statement quoted by petitioners. In *Eastern*, by contrast, Justice Breyer's dissent expressly agreed with Justice Kennedy that the "Takings Clause does not apply." 118 S. Ct. at 2161. The court of appeals hardly can be faulted, therefore, for concluding that five Members of the Court have rejected petitioners' Takings Clause rationale. In any event, petitioners have fallen far short of demonstrating that there is any persistent or intractable problem in interpreting and applying decisions of this Court in which there is no majority opinion.

Petitioners are also wrong in suggesting that the Court's recent grant of review in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (1999) (No. 98-1161), has something to do with this case. *Pap's* involves a First Amendment challenge to a local ordinance banning nude dancing. The City of Erie contends that the Pennsylvania Supreme Court erroneously failed to follow this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Nothing that the Court could decide in *Pap's* would bear on the propriety of the Coal Act's application to post-1974 NBCWA signatories like petitioners.

Nor is there any basis for petitioners' claim that the federal courts now are "divided about whether the burdening of a 'specific' property interest is an essential element of any Takings Clause claim." Pet. 27. *Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799 (7th Cir. 1999), *cert. pending*, No. 99-420 (filed Sept. 7, 1999), is in no way inconsistent with the court of appeals' decision here. The Seventh Circuit there simply followed this Court's decisions in *Connolly*, 475 U.S. 211, and *Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and rejected Due Process Clause and Takings Clause challenges to the Multiemployer Pension Plan Amendments Act of 1980. No issue regarding the defendant employer's lack of a "specific property interest" affected by the statute was raised or discussed. The second case on which petitioners rely for the alleged division among federal courts, *Vermont Assembly of Home Health Agencies, Inc. v. Shalala*, 18 F. Supp. 2d 355, 369 (D. Vt. 1998), held that the challenged Medicare fee limits imposed no legal compulsion on plaintiffs and therefore could not possibly effect a taking. The court *explicitly* found it unnecessary to decide the issue as to which petitioners contend the courts are in conflict. *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Subtitle C—Health Care of Coal Miners

Sec. 19141. Short Title.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992".

Sec. 19142. Findings and Declaration of Policy.

(a) FINDINGS.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) STATEMENT OF POLICY.—It is the policy of this subtitle—

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Sec. 19143. Coal Industry Health Benefits Program.

(a) IN GENERAL.—The Internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

"Subtitle J—Coal Industry Health Benefits

* * * *

"Sec. 9706. Assignment of Eligible Beneficiaries.

* * * *

"(b) RULES RELATING TO EMPLOYMENT AND REASSIGNMENT UPON PURCHASE.—For purposes of subsection (a)—

"(1) AGGREGATION RULES.—

"(A) RELATED PERSON.—Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

"(B) CERTAIN EMPLOYMENT DISREGARDED.—Employment with—

"(i) a person which is (and all related persons with respect to which are) no longer in business, or

"(ii) a person during a period during which such person was not a signatory to a coal wage agreement,

shall not be taken into account.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such

successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

"(c) IDENTIFICATION OF ELIGIBLE BENEFICIARIES.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Secretary of Health and Human Services a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

"(d) COOPERATION BY OTHER AGENCIES AND PERSONS.—

"(1) COOPERATION.—The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Secretary of Health and Human Services in providing information which will enable the Secretary to carry out his responsibilities under this section.

"(2) PROVIDING OF INFORMATION.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, including section 6103,

the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Secretary of Health and Human Services in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Secretary shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Secretary, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Secretary shall be so advised.

"(B) LIMITATION.—Any information provided under subparagraph (A) shall be limited to information necessary for the Secretary to carry out his duties under this section.

"(3) TRUSTEES.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Secretary in furnishing, or assisting the Secretary to obtain, any information the Secretary needs to carry out the Secretary's responsibilities under this section.

"(e) NOTICE BY SECRETARY.—

"(1) NOTICE TO FUND.—The Secretary of Health and Human Services shall advise the trustees of the Combined Fund of the name of each person iden-

tified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

"(2) OTHER NOTICE.—The Secretary of Health and Human Services shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

"(f) RECONSIDERATION BY SECRETARY.—

"(1) IN GENERAL.—Any assigned operator receiving a notice under section (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Secretary of Health and Human Services detailed information as to the work history of the beneficiary and the basis of the assignment.

"(2) REVIEW.—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Secretary of Health and Human Services shall conduct such review if the Secretary finds the operator provided evidence with the request constituting a prima facie case of error.

"(3) RESULTS OF REVIEW.—

"(A) ERROR.—If the Secretary of Health and Human Services determines under a review under paragraph (2) that an assignment was in error—

"(i) the Secretary shall notify the assigned operator and the trustees of the

Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review the beneficiary's record for reassignment under subsection (a).

"(B) NO ERROR.—If the Secretary of Health and Human Services determines under a review conducted under paragraph (2) that no error occurred, the Secretary shall notify the assigned operator.

"(4) DETERMINATIONS.—Any determination by the Secretary of Health and Human Services under paragraph (2) or (3) shall be final.

"(5) PAYMENT PENDING REVIEW.—An assigned operator shall pay the premiums under section 9704 pending review by the Secretary of Health and Human Services or by a court under this subsection.

"(6) PRIVATE ACTIONS.—Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Secretary.

"(g) CONFIDENTIALITY OF INFORMATION.—Any person to which information is provided by the Secretary of Health and Human Services under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

"PART III—ENFORCEMENT

"Sec. 9707. Failure to Pay Premium.

"(a) GENERAL RULE.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

"(b) AMOUNT OF PENALTY.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

"(c) NONCOMPLIANCE PERIOD.—For purposes of this section, the term 'noncompliance period' means, with respect to any failure to pay any premium or installment thereof, the period—

"(1) beginning on the due date for such premium or installment, and

"(2) ending on the date of payment of such premium or installment.

"(d) LIMITATIONS ON AMOUNT OF PENALTY.—

"(1) IN GENERAL.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

"(2) CORRECTIONS.—No penalty shall be imposed by subsection (a) on any failure if—

"(A) such failure was due to reasonable cause and not to willful neglect, and

"(B) such failure is corrected during the 30-day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

"(3) WAIVER.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

"(e) LIABILITY FOR PENALTY.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

"(f) TREATMENT.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

"PART IV—OTHER PROVISIONS

"Sec. 9708. Effect on Pending Claims or Obligations.

"All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based

on the 'evergreen' clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

* * * *

"Subchapter D—Other Provisions

"Sec. 9721. Civil Enforcement.

"The provisions of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount required to be paid by this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding sentence, a signatory operator and related persons shall be treated in the same manner as employers.

"Sec. 9722. Sham Transactions.

"If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction."

(b) AMENDMENTS TO SURFACE MINING ACT.—

(1) EXTENSION OF FEE PROGRAM.—Section 402 (b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(b)) is amended by striking "September 30, 1995" and inserting "September 30, 2004".

(2) TRANSFER TO FUND.—Section 402 of such Act (30 U.S.C. 1232) is amended by adding at the end the following new subsection:

"(h) TRANSFER OF FUNDS TO COMBINED FUND.—(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

"(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 for any fiscal year an amount equal to the sum of—

"(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

"(B) the amount by which the amount described in subparagraph (A) is less than $70,000,000.

"(3)(A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

"(B) The aggregate amount which may be transferred under paragraph (2)(B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992, and before October 1, 1995.

"(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year."

(3) CONFORMING AMENDMENTS.—(A) Section 401(c) of such Act (30 U.S.C. 1231(c)) is amended by striking "and" at the end of paragraph (11), by redesignating paragraph (12) as paragraph (13), and by adding after paragraph (11) the following new paragraph:

"(12) for the purpose described in section 402 (h); and".

(B) Section 402(g)(1) of such Act (30 U.S.C. 1232(g)) is amended by striking "Moneys" and inserting "Except as provided in subsection (h), moneys".